Supreme Court, U.S.
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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, ex rel.
DONALD B. WILLIS
Petitioner

vs.

GENERAL DYNAMICS CORPORATION,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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13pp

QUESTIONS - COST APPEAL NO. 94-16005

1. Under the Qui Tam provisions (31 U.S.C. 3730) of the False Claims Act (FCA), is a Qui Tam relator liable for costs of a prevailing defendant in an action that is not clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment?

2. Do the Qui Tam provisions of the FCA provide express provisions for award of costs to the prevailing party as contemplated by Federal Rule of Civil Procedure (F.R.C.P.) 54 (d)?

3. Is the Government liable under 31 U.S.C. 3730(f) for the Attorneys' Fees and Costs of the Qui Tam relator who brings an action under the FCA ?

4. Could any potential private citizen qui tam relator read the Qui Tam provisions of the FCA and comprehend that he/she would be liable under F.R.C.P. 54(d) for a prevailing defendant's costs in a good faith action?

5. Didn't congress use the general term expenses in the discretionary award of 3730(d)(4) to allow the court to adapt the severity of the award to fit the degree of bad faith shown by the qui tam relator?

6. Can the intent of Congress be so construed as to allow discretionary award of Attorneys' Fees and Expenses against a bad faith Qui Tam relator who brings a clearly frivolous action but require mandatory award of Costs against a good faith Qui Tam relator who brings a non-frivolous action?

QUESTIONS - MERITS APPEAL NO. 93-16690

1. Is it not plain error and a miscarriage of justice when a court, based on opinion testimony of lay witnesses, determines that MIL-D-1000A is ambiguous and therefor Level 3 Drawings need not be adequate to support build-to-print contracts when Prima Facie evidence clearly shows that, during contemporaneous contract performance, both the Air Force (AF) and General Dynamics (GD) were participants in using GD's Level 3 Drawings in a follow-on build-to-print contract?

2. Is it not plain error and a miscarriage of justice when a court, based on opinion testimony of lay witnesses, determines that MIL-D-1000A is ambiguous and Level 3 Drawings need not be adequate to support build-to-print contracts when Prima Facie evidence clearly shows that, for over 30 years, Level 3 Drawings for build-to-print contracts have been the Government's primary recourse to obtain follow-on competitive procurement of identical products and spare parts without being locked into the original contractor on sole-source contracts?

3. Is it not plain error when,

a) the defendant/appellee makes false statements to the court in its answer brief concerning the validity of specific cited testimonies, and

b) the plaintiffs/appellants, while researching the false statements, discover and verify in their answer brief that the specific testimonies included hearsay, were not based on witness's personal knowledge, included a witness who gave conflicting testimony and was impeached, and included opinion testimony of a lay witness concerning MIL-D-1000 who had never read the document, and

c) the 9th Circuit, in its Opinion, cites the specific testimonies as evidence material to its holdings?

4. Since the district court and 9th Circuit have found that errors and omissions are acceptable in Level 3 Drawings produced in accordance with drawing standard MIL-D-1000A, has the Government been violating contractor's rights and acting unlawfully by requiring such errors and omissions, when discovered, to be corrected under a contract Warranty of Technical Data clause?

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United States ex rel. Stillwell v. Hughes Helicopters, et al. (CA CD), 5/31/89, Fed Contr Rep, Vol. 51 at 1094 9

OTHER AUTHORITIES

Senate Report No. 345, 99th Cong. 2d Sess. (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5266 7, 9, 10, 11,

OPINIONS BELOW

The Opinion of the Court of Appeals is scheduled for publication and is set forth in Appendix A. The Order of the Court of Appeals denying petitioners' petition for rehearing and rejecting suggestion for rehearing en banc is set forth in Appendix E and is believed unreported.

The Findings of Fact and Conclusions of Law of the District Court on the merits are set forth in Appendix B and is believed unreported. The judgment of the District Court is set forth in Appendix C and is believed unreported.

The Order of the District Court awarding costs is set forth in Appendix D and is believed unreported.

JURISDICTION

The Opinion of the 9th Circuit Court of Appeals was entered on August 2, 1995. The Order of the 9th Circuit Court of Appeals, denying the petition for rehearing and rejecting the suggestion for rehearing en banc, was entered on October 4, 1995. This petition has been filed within 90 days of that date.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

I. False Claims Act (31 U.S.C. 3729 et seq.)

3730(d) Award to qui tam plaintiff. (1) If the Government proceeds with an action . . . Any such person shall also receive an amount of reasonable expenses which the court finds to have been necessarily

incurred, plus reasonable attorneys' fees and costs. All such expenses, fees and costs shall be awarded against the defendant. (2) If the Government does not proceed with an action . . . Such person shall also receive an amount of reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees and costs shall be awarded against the defendant. . . . .
(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

3730(f) Government not liable for certain expenses. The Government is not liable for expenses which a person incurs in bringing an action under this section.

3730(g) Fees and expenses to prevailing defendants. In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

II. Federal Rule of Civil Procedure 54

A. Superseded 1 Dec. 1993 after judgment and 1986 Amendments to FCA.

54(d) Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . .

B. Effective 1 Dec. 1993[1]

54(d) Costs; Attorneys' Fees

(1) Costs other than Attorneys' Fees. Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs . .

(2) Attorneys' Fees. . . .

STATEMENT OF THE CASE

I. PRE-TRIAL

In the early 1970s, the Air Force (AF) awarded a competitive contract to General Dynamics (GD) for development of a Multiple Threat Emitter System (MUTES). Upon completion of that contract, the AF and GD entered into a written "Interpretation Agreement, Level 3 Drawing Requirements - MIL-D-1000A and AFAD 71-700" which was signed by Col. Schuster of the AF and R. McClendon and D. P. Fuller as representatives of GD. Col. Schuster testified in this action that the Level 3 Drawings were intended for competitive build-to-print production of MUTES systems. Mr. McClendon testified that the drawings should allow another manufacturer to build identical MUTES systems. Mr. Fuller testified he authored or approved the statement of footnote 2. GD included the Interpretation Agreement in its proposal for a sole-source contract to provide 4 MUTES systems and

[1]Notes of Advisory Committee on Rules to 1993 amendment. **Paragraph (1).** Former subdivision (d), providing for taxation of costs by the clerk, is renumbered as paragraph (1) and revised to exclude applications for attorneys' fees. **Paragraph (2).** This new paragraph establishes a procedure for presenting claims for attorneys' fees, whether or not denominated as "costs." . . .

deliver MUTES Level 3 Drawings. Upon completion of that sole source contract (-0103), the Level 3 Drawings were not ready for delivery and the AF awarded GD a second sole-source contract (-0366) in 1982 for 4 additional MUTES and completion of the delivery of the Level 3 Drawings.

In mid 1986, using the Level 3 Drawings GD had delivered to date, the AF issued a solicitation for a competitive build-to-print procurement of up to 14 MUTES systems followed by a bidders' conference where contractor questions were addressed concerning the anticipated build-to-print contract. GD attended the bidders conference, did not question the use of its Level 3 Drawings in the build-to-print solicitation and submitted an unqualified proposal for the build-to-print contract.[2]

The AF awarded the build-to-print contract to Aydin Corporation West (Aydin) in March 1987. Aydin discovered that some of the microfilm of the GD Level 3 Drawings was illegible. In July of 1987, the AF and GD entered into the Aperture Card contract[3] specifically to provide Aydin with a legible set of microfilm of the Level 3 Drawings to use in manufacturing MUTES systems on its build-to-print contract. GD delivered the microfilm in August of 1987 and invoiced for payment with no disclaimer that the Level 3 Drawings were unfit for the intended use.

Also in August of 1987, GD submitted a DD250 evidencing that delivery of the Level 3 Drawings on the -

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[2]GD Technical Proposal at 1. stated "We recognize that this procurement is a build-to-drawing for systems which are the same as AN/MST-T1A MUTES Number 8 with the above changes, as identified in Data Package 654M1000 AG and supplied with the solicitation."

[3]In the opinion, Appendix A-4, the 9th Circuit incorrectly states "the AF and Aydin therefore contracted for a new set of these aperture cards (the Aperture Card Contract)." The opinion did not address alleged GD FCA violations under the Aperture Card contract.

0366 contract was final and followed in 1989 with an invoice for payment.

In mid 1988, Aydin informed the AF that the Level 3 Drawings were defective and would not support manufacture of the MUTES systems. In early 1989, the AF confirmed that the drawings were defective and, since they had warranted the drawings to be adequate for the build-to-print contract[4], modified the contract to pay Aydin over $20 million to correct problems caused by the defective drawings.

In October 1989, plaintiffs filed an action under the FCA against GD for knowing delivery of defective Level 3 and other drawings under the -0366 contract and obsolete microfilm under the Aperture Card contract. The Government elected not to intervene in the action although the Staff Judge Advocates at both McClellan and Eglin Air Force Bases recommended entry into the case (Appendix F, Trial Exhibit G-111).

II. TRIAL PROCEEDINGS

The non-jury trial was bifurcated into Jurisdictional and Merit Phases. The jurisdictional phase began on September 15, 1992 and was decided in favor of plaintiffs on October 1, 1992 based on absence of public disclosure. The court made the following finding;

> "Therefore, I find that prior to the filing of plaintiffs' complaint on October 12, 1989, the Government had knowledge of the fact that General Dynamics' technical data package contained errors and discrepancies and that it was inadequate to enable another manufacturer to build the MUTES and all other essential facts and information upon which this action is based in the complaint."

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[4]In the opinion, Appendix A-4, the 9th Circuit incorrectly states "the AF did not warrant that the drawings were adequate for build-to-print contracts."

The Merits phase began on February 17, 1993. By amended pre-trial order, the majority of the testimony was taken outside the court's presence attended only by opposing counsel and the court reporter. GD based their defense on premises that 30 year old drawing standard MIL-D-1000A was ambiguous, that the AF misused the Level 3 Drawings in a build-to-print contract and that the AF was satisfied with GD's contract performance. GD, however, provided no evidence nor even claimed that they had ever notified the AF that MIL-D-1000A was ambiguous or that the Level 3 Drawings were not intended for or adequate to support the follow-on build-to-print contract with Aydin.

In August of 1993, the district court issued their Findings of Fact and Conclusions of Law with judgment in favor of GD. Upon review of those Findings of Fact, the plaintiffs discovered that they were an almost verbatim copy of the GD proposed findings of fact[5] and many were clearly in direct conflict with contract terms and conditions which the court had not found ambiguous. The plaintiffs filed a timely appeal (93-16690) on the merits and GD filed a cross-appeal (93-16823) on jurisdiction. The plaintiffs' opening brief requested de novo review of over 30 specific contract terms and conditions as they applied to and clearly conflicted with the findings of fact.[6]

In the judgment, the district court found the action to be closely litigated and not frivolous and denied attorneys' fees and expenses to GD (Appendix B-24, No. 19). Following judgment, GD submitted a $246,000 bill of costs which the court Clerk denied. GD requested reconsideration of the clerk's action which resulted in the court awarding costs to GD under FRCP 54(d). The

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[5]GD's 94-16005 Answer Brief at footnote 8 states, "the District Court's 72 post-trial findings of fact are based entirely on the proposed facts presented by General Dynamics."

[6]The 9th Circuit Opinion addressed none of the appellants' de novo review requests.

plaintiffs timely appealed the cost award (94-16005). After perfecting the appeals, one of plaintiffs counsel was deceased and the other withdrew. No other counsel could be located who could comprehend this complex action in the time allowed so the plaintiffs completed the appeal process pro se.

REASONS FOR GRANTING THE PETITION

I. RULE 10 BASIS

This petition addresses very important questions of federal law, decided by the 9th Circuit, which have not but should be settled by this court. The 9th Circuit decisions also conflict with interpretations of other courts, including the 2nd, 5th, 6th and 7th Circuits. In addition, the 9th Circuit decisions involve highly questionable judicial proceedings at both the circuit and district court levels.

II. IMPORTANCE OF THE ISSUES

The 9th Circuit decisions result in negative impacts to the public welfare which are unmeasurable and extend far beyond this instant case.

The finding that a qui tam relator is liable for costs of a prevailing defendant in a non-frivolous FCA action evokes two negative results. First, no potential good faith relator will now step forward to expose fraud knowing that he/she will be liable for potentially hundreds of thousands of dollars of defendant's expenses when, as in this case, a court could decide that a contract is ambiguous even though both parties have contemporaneously agreed on a common interpretation. This will result in untold billions of taxpayers' dollars being consumed by unreported fraud. Second, all prior district courts have denied such costs to prevailing defendants with obvious concurrence of defendants' attorneys since no appeals are on record. With the 9th Circuit ruling, the district courts will now be

faced with maintaining precedent of denying costs or accepting the 9th Circuit position. Regardless of the outcome, the shunned party will request reconsideration and/or appeal the result. This will result in pure waste of precious district/appeal court time with associated unnecessary expenditure of public funds.

The 9th Circuit ruling that MIL-D-1000 is ambiguous and therefor that Level 3 drawings are not intended or need be adequate for "build-to-print" contracts may be far more costly to the taxpayers. For some 30 years, the Department of Defense (DOD) has continually purchased drawings from the development contractor to competitively procure future identical systems and spare parts. DOD has routinely used those drawings in the most economical fashion of "build-to-print" contracts. The 9th Circuit ruling means that all current DOD contracts purchasing Level 3 drawings are worthless, i.e. the contractor may deliver, with impunity, drawings which are not usable. DOD also has repositories full of Level 3 drawings which are used to procure identical systems and spare parts for systems in the field. Under this ruling, the original contractor may take legal action to force DOD to desist in using their drawings for purchasing build-to-print identical systems/spare parts. The only DOD recourse would be to purchase these items on sole-source contracts with the original contractor at non-competitive prices. It is also conceivable that, where DOD has required correction of errors or omissions in the Level 3 drawings under a contract Warranty of Data clause such as ASPR 7-104.9, the contractor may take legal action to recover the costs of the corrections. The petitioner cannot even estimate the eventual costs to the taxpayers of this ruling.

III. AMPLIFYING ARGUMENT - COST APPEAL

The proper interpretation of the FCA is that qui tam relators are not liable for the costs of a prevailing

defendant in a non-frivolous action. Three courts have interpreted the FCA in this light. The Eastern District (CA) noted in *United States ex rel. Stillwell* at 1101 that;

> "Third, a plaintiff who files a frivolous claim under the Act can be held liable for attorney's fees and costs under 31 U.S.C. section 3730(d)(4)."

The 2nd Circuit in *United States ex rel. Kriendler* at 1154 stated;

> "Because the Qui Tam relator: . . . (3) may be liable for costs if the suit is frivolous, the relator's personal stake in the case is sufficiently ensured."

The 9th Circuit in *United States ex rel. Kelly* quotes 3730(d)(1), (2) and (4), cites and quotes the 2nd Circuit in *United States ex rel. Kriendler* at 749, and further states at 752;

> "a relator who pursues a frivolous action can be ordered to pay the defendant's costs and attorneys' fees."

In the opinion at Appendix A-13, the 9th Circuit retracts its statements as "imprecise word choice in dicta." However, all three courts initial interpretation of the FCA is consistent with the petitioner, all other QUI Tam relators, all prior District Courts and all prior attorneys of prevailing defendants in non-frivolous actions. This is consistent with the intent of Congress in adopting the 1986 amendments to the FCA as expressed in Senate Report 345;

> at 5288, "The committee's overall intent in amending the qui tam section of the FCA is to encourage more private enforcement suits.", at 5267, " S. 1562 increases incentives, financial and otherwise, for private individuals to bring suits. . .", and at 5293, "If a potential plaintiff reads the present statute and understands . . .".

No potential plaintiff could read the qui tam provisions of the FCA and understand that he/she would be liable for a prevailing defendant's costs under some obscure undesignated rule (F.R.C.P. Rule 54). The Senate Report

at 5294 clearly notes that 3730(d)(4), discussed as 3730(d)(6), is intended only to penalize the bad faith relator who brings a frivolous, vexatious or harassing action.

In its opinion at Appendix A-12, the 9th Circuit finds,

> "Although the question is close, we reject this argument because under the FCA, fees, expenses, and costs are three distinct categories. 'Costs,' under the FCA is not a subset of 'expenses'."

Section 3730(f) of the FCA states that the government is not liable for the "expenses" of the person bringing the action. Senate Report at 5294 states;

> "Paragraph ( ) also clarifies that the Government will in no way be liable for *fees or expenses* incurred by a private individual who brings a civil false claims action."

The Senate report makes it obviously clear that fees, expenses, and costs are not three distinct categories and fees and costs are a subset of expenses in 3730(f). The Congress use of the term expenses in 3730(f) could not be more aptly defined than by the court in *Dickerson* ,

> "*Expenses* includes all expenditures actually made by a litigant in connection with the action."

A myriad of courts have defined "costs" as "taxable expenses" including the 1st Circuit in *Gradmann.* Ironically, GD in its Motion for Review of Clerk's Denial of Costs, stated, ". . . do not provide guidance with respect to the taxability of GD's expenses."

Section 3730(g) addresses fees and expenses to prevailing defendants but, in the 9th Circuit opinion at Appendix A-12, it is noted that costs are awarded under 3730(g). Those costs are certainly a subset of expenses

Section 3730(d)(4) of the FCA does provide an express provision for the award of costs as envisioned under F.R.C.P. 54(d). A simple review of the Notes of the Advisory Committee on Rules (See Footnote 1 infra.) discloses that the term costs as used therein was revised

to exclude attorneys' fees. Also, the 5th Circuit in *Jones*, the 6th Circuit in *Johnson* and the 7th Circuit in *Bond* all held that attorneys' fees should be characterized as an item of costs as under the provision of Rule 54(d). Since 3730(d)(4) specifically covers attorneys' fees and expenses, F.R.C.P. 54(d) is preempted by the FCA provisions.

Congress would also have had no reason to include the term "costs" in sections 3730(d)(1) and (2) had they anticipated cost awards under Rule 54(d). The Senate Report also makes no reference whatsoever to Rule 54(d) and, in the discussion of section 3730(d) and its subsections at 5292-5294, speaks only of fees and expenses with not a single mention of the word "costs."

Finally, this petitioner has reviewed hundreds of authorities and literature concerning the interrelationship of the terms fees, expenses and costs. This review revealed that, among the courts and experts, there is no accepted specific relationship. As examples in this case, the Rules Committee commenting on the 1993 changes to F.R.C.P. 54(d) noted that the term "costs" included attorneys' fees and expenses and under U.S.C. 31 3730(f), it is clear that the term "expenses" includes attorneys' fees and costs. This simply means that a zealous attorney can express any fortuitous relationship, quote authorities supporting that position and go forward in the court with a reasonable chance of success. Therefore, the use of the terms "attorneys' fees", "costs" and "expenses" in a statute must be interpreted based on the intent of the authors of the statute. In the case of the FCA, it is clear that Congress intended section 3730(d)(4) to deny costs to a prevailing defendant in a non-frivolous action.

IV. AMPLIFYING ARGUMENT - MERITS APPEAL

The Armed Services Board of Contract Appeals has provided the definition of Level 3 Drawings. In *General Atronics,* Finding of Fact number two states;

> "Level 3 drawings are "build-to-print" production drawings with all of the manufacturing process instructions required to manufacture an item."

The district and 9th circuit court rulings, that MIL-D-1000 is ambiguous and therefore Level 3 drawings are not intended or need be adequate for build-to-print contracts, are in direct conflict with established rules of Government contract interpretation as supported by the courts. Moreover, these rulings were based on opinion testimony of lay witnesses when the dispute was initiated at trial some 6 years after the contract was completed.

Prior to the -0103 contract, the AF and GD entered into a written interpretation agreement regarding the MIL-D-1000 requirement for delivery of Level 3 drawings. That agreement was included in the GD proposal for the contract. Col. Schuster, the AF officer who signed the agreement, testified at trial that the Level 3 drawings were for complete MUTES systems and build-to-print contracts. Witnesses R. McClendon and D. P. Fuller, who signed the agreement as representatives of GD, did not take exception to Col. Schuster's testimony. In *Perry & Wallace* , the court of claims stated:

> "A party who willingly and without protest enters into a contract with knowledge of the other party's interpretation of it is bound by such interpretation and cannot later claim that it thought something else was meant."

During the -0366 contract, the AF issued a solicitation for a competitive build-to-print contract using the GD Level 3 drawings. GD prepared and submitted a compliant proposal for that award. The AF awarded the contract to Aydin Corporation. GD was fully aware in that contract action of the AF interpretation that the drawings were

intended and adequate for a build-to-print contract. A contracting party is bound by its knowledge of the other parties interpretation of the contract unless it indicates timely disagreement prior to a dispute arising. See *Shadrick Contracting Co.*, *Maxwell Dynamometer Co.* and *Liles Constr. Co.* . The court of claims in *Cresswell* also found;

> "[2] If one party to a contract knows the meaning that the other intended to convey by his words, then he is bound by that meaning. The same is true if he had reason to know what the other party intended."

GD and the AF also entered into an Aperture Card contract specifically to provide legible copies of the Level 3 drawings for Aydin Corp. to build the MUTES systems under the build-to-print contract. Again, GD was bound by knowledge of the AF interpretation that the Level 3 drawings were adequate and intended for that build-to-print contract. This knowledge existed years before the dispute on MIL-D-1000 ambiguity surfaced during this trial.

In reality, GD committed a violation of the FCA regardless of which interpretation of MIL-D-1000A is considered. If the interpretation is that Level 3 drawings must support a build-to-print contract, then the knowing delivery of drawings that were not adequate for build-to-print under the basic -0366 MUTES contract was a violation. If the interpretation is that Level 3 drawings are <u>not</u> to support a build-to-print contract, then GD's delivery of microfilm of the Level 3 drawings under the Aperture Card contract, knowing they were inadequate for the AF to provide to Aydin to manufacture MUTES on the build-to-print contract, was a violation.

Also, the well established DOD practice of using Level 3 drawings in build-to-print contracts was obviously known to GD, one of the world's largest defense contractors. The General Manager of the GD Fort Worth division, Mr.

Adams, testified concerning Level 3 drawings, "And then you pass them out and presume they give them to someone to build-to-print."

The GD evidence accepted and used by the courts in this case was often inadmissible. As a mammoth corporation and without Government intervention, GD was able to recruit friendly government witnesses and entail a bevy of attorneys to orchestrate their testimony. Their goal was to convince the courts that MIL-D-1000 was ambiguous, that Level 3 drawings were not intended nor need be adequate for build-to-print contracts and that the AF was happy with GD's contract performance. This goal was enhanced by the district court discouraging objections by stating;

> "We don't have a jury here and I'm fully capable to cull out the information that is reliable and is the kind of information that I'm going to use and that which is not reliable."

The ability to use testimony of questionable admissibility was also furthered by the fact that nearly all of the testimony was taken outside the presence of the court with only counsel and the court reporter.

This is clearly noted by looking at the testimony taken from GD's answer brief and quoted in the 9th Circuit opinion as material to its holdings. In the opinion at Appendix A-9, Col. Rider's testimony as to the Government's interest in purchasing the drawings is quoted as;

> "to support repair and was to support the acquisition of spare parts" and "it was generally recognized . . . that Level 3 data rarely supported build-to-print."

Plaintiffs, in their reply brief, specifically pointed out that Col. Rider had also testified

> "My conclusion that the data was intended only to purchase spare parts was based on conversations"

which was hearsay. Plaintiffs also pointed out that Col. Rider was not part of the initiation of the contract and had no personal knowledge of the parties intent. In the opinion at Appendix A-9, Col. Devenny's testimony as to whether data for competitive procurement meant data for a build-to-print contract is quoted as,

> "No. Data for competitive procurement means enough data to sustain a true level of competition, which can mean a variety of levels of data.".

Plaintiffs, in their reply brief, specifically pointed out that Col. Devenny had testified that he had never read MIL-D-1000A, the standard for competitive procurement of data. The opinion at Appendix A-9 quotes testimony of James Gavin;

> "We've been using those drawings for ten or 12 years without any difficulty . . . And I stand by the data. We've been using the drawings and continued to use those drawings. The United States government is very happy with the drawings, and we're going to continue to be happy with them."

Plaintiffs, in their reply brief, pointed out that Mr. Gavin also testified that,

> "I know that we had problems with those drawings" and "the drawings were not adequate for the intended purpose of build-to-print."

Common sense would also indicate that the AF was not very happy with GD drawings when they had to pay the follow-on contractor over $20 million to make them usable for the intended purpose. Plaintiffs also pointed out that Mr. Gavin was impeached in testifying that the drawings were only intended for spare parts. Mr. Gavin also provided that impeached information to the AF Office of Special Investigation (OSI) which was a primary reason the Government did not intervene in this action (Appendix F-1, para. 2. and 3.)

Based on the facts that,

1) the 9th Circuit used these testimonies in the opinion as material to their holdings despite the specific objections by the plaintiffs,

2) the 9th Circuit did not address in the opinion any of the plaintiffs' *de novo* review requests,

3) the 9th Circuit did not address in the opinion any of the plaintiffs' alleged GD violations of the FCA,

4) the 9th Circuit opinion identified Aydin, not GD, as the contractor on the Aperture Card contract under which plaintiffs alleged a GD FCA violation,

and 5) the words in the opinion were rooted primarily in GD's briefs, this petitioner sincerely questions whether the 9th circuit read and/or understood the *pro se* plaintiffs' briefs.

The petitioner believes that the magnitude of the errors made by the lower courts will be evident should the Supreme Court decide to review those briefs.

CONCLUSION

In view of the foregoing reasons, the petitioner requests that a writ of certiorari issue to review the judgment and opinion of the 9th Circuit Court of Appeals for both the Cost and Merits appeals.

Dated: Dec. 8, 1995

Respectfully Submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
ex rel. Murray W. Lindenthal; Donald B. Willis
Plaintiffs-Appellants,

Nos. 93-16690
94-16005
D.C. No.
CV-89-01411-WBS

v.

GENERAL DYNAMICS CORPORATION
Defendant-Appellee.

UNITED STATES OF AMERICA,
ex rel. Murray W. Lindenthal; Donald B. Willis
Plaintiffs-Appellees,

Nos. 93-16823
D.C. No.
CV-89-01411-WBS

v.

GENERAL DYNAMICS CORPORATION
Defendant-Appellant.

OPINION

Appeals from the United States District Court
for the Eastern District of California
William B. Shubb, District Judge, Presiding

Argued and Submitted
July 12, 1995 - San Francisco, California

Filed August 2, 1995

Before: Cynthia Holcomb Hall, Charles Wiggins,
and Edward Leavy, Circuit Judges

Opinion by Judge Hall

APPENDIX A

OPINION

HALL, Circuit Judge

These appeals arise out of an action under the False Claims Act (FCA).[1] The relators prosecuted the action on their own after the Government declined to intervene.

The relators' theory of the case is as follows: General Dynamics (GD) contracted with the Air Force (AF) to produce, and provide engineering drawings for, an elaborate radar system called MUTES. MUTES is a mobile system used to train pilots by simulating the signals of various enemy radar. After a period of years, the AF solicited bids on a competitive basis from other companies who wanted to build MUTES. The AF awarded the follow-on contract to Aydin Corporation. The drawings GD had supplied to the AF proved inadequate for Aydin to produce MUTES according to its contract, and the AF was therefore forced to renegotiate the terms of its contract with Aydin at a cost of over $20 million.

The relators, who are insiders at Aydin, claim that GD knowingly provided inadequate drawings to the AF, and that this "fraud" actually damaged the United States in the amount the AF had to pay to alter the terms of the follow-on contract.

The district court held a bench trial to determine whether jurisdiction lay under the FCA. It found it had jurisdiction. The court then held a second bench trial on the merits of the FCA claim. After finding that GD had not knowingly submitted any false claims to the AF, the court entered judgment for GD. GD, as the prevailing party, then requested an award of costs. The court awarded it approximately twenty percent of its claimed costs. The relators appeal the judgment on the merits of their claim, and GD cross-appeals the district court's conclusion that it

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[1] See31 U.S.C. § 3729 et seq.

had jurisdiction under the FCA. The relators separately appeal the judgment for costs.[2]

The district court had federal question jurisdiction under 28 U.S.C. § 1331. This court has jurisdiction over the appeal under 28 U.S.C. 1291, over the cross-appeal under 28 U.S.C. 1291 and Fed. R. App. P. 4(a)(3), and over the appeal from the costs judgment under 28 U.S.C. 1291.

I.

In the 1970s GD conceived of MUTES (Multiple Threat Emitter Systems). MUTES is a complex mobile system that simulates the threat of enemy forces. The AF uses it to train pilots. Based on GD's idea, the AF conducted a competitive procurement for the award of a contract to build and produce engineering drawings for MUTES. GD won this contract, and it became effective in February 1978. This contract is generally referred to as "0103."

The district court found that 0103 obligated GD to provide a technical data package including engineering drawings so that the AF could then use the drawings to procure spare parts. The contract further required that some of those drawings meet a set of requirements called "Level 3." Level 3 requirements are described in a Department of Defense document entitled "MIL-D-1000A." Although MIL-D-1000A does not specify precisely the kind of data to be included on Level 3 drawings, it does describe Level 3 drawings as those that would allow a competent manufacturer to reproduce the item based on the drawings.

In the following years, as a result of normal quality control audits, the parties evaluated the drawings and the MUTES system. As a result of these internal audits, GD made changes to its drawings. The AF, however, at all

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[2] These appeals have been consolidated.

times considered GD's drawings to be satisfactory under the 0103 contract.

In 1982, GD and the AF entered into a second contract, referred to as "0366." 0366 required GD to build more MUTES and to deliver new copies of the drawings that had been revised as a result of the internal audits. GD made approximately 6098 changes to its original drawings.

In late 1986 and early 1987, the AF initiated an effort to solicit proposals from other contractors to build more MUTES. Although the AF intended to award the follow-on contract on a performance basis,[3] an AF contracting officer ultimately decided to solicit bids on a build-to-print basis.[4] As a part of this solicitation of bids, the AF warranted that certain of GD's drawings - which would be provided to the winner of the follow-on contract - met Level 3 specifications. The AF did not warrant that the drawings were adequate for build-to-print contracts.

In 1987, the AF awarded the follow-on contract to Aydin on a build-to-print basis. Aydin had difficulty reproducing the MUTES systems, and was forced to seek permission from the AF to alter some of GD's drawings. Moreover, many of the "aperture cards" the AF provided to Aydin, which contained engineering data, were illegible due to poor handling and copying by the AF. The AF and Aydin therefore contracted for a new set of these aperture cards (the Aperture Card Contract).

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[3] According to GD, a performance specification contract obligates the contractor to produce a system, for the contract price, that meets the performance requirements of the contract, regardless whether the drawings are perfectly accurate.

[4] A "build-to-print" contract requires the contractor to build the product precisely according to the tecchnical data package supplied by the government - and requires the government to pay additional sums every time the contractor has to change a drawing because of an error or omission.

Aydin's continuing difficulties led in 1989 to a renegotiation of the follow-on contract in which the AF agreed to pay an additional $22 million in exchange for Aydin's agreement to continue to produce MUTES on a performance specification, rather than a build-to-print, basis. The relators filed their sealed complaint soon afterward in October, 1989.

The district court held trial in two phases. Phase I was a bench trial to determine whether the court had jurisdiction under the FCA. The court ruled that although the claim would have been barred under the version of the FCA in force prior to 1986 because the government had the knowledge forming the basis of the claim, the claim was saved by a 1986 amendment, which the court applied retrospectively. The court ruled that the new provision bars claims only when they are based upon certain public disclosures, and that these claims were not based upon any public disclosures within the meaning of the FCA. The court therefore asserted jurisdiction.

Phase II was a bench trial on the merits of the relators' claims. The court found that the terms of both contracts, including the incorporation of the Level 3 specification, to be ambiguous, and therefore accepted extrinsic evidence regarding the understanding of the parties as to whether the drawings were expected to be error free or suitable for "build-to-print" follow-on contracts and, therefore, that none of the DD Form 250's[5] or claims for payment constituted false or fraudulent claims. It also concluded that, even had GD submitted false claims, it did not have the scienter required in order for liability to attach.

After the entry of judgment, GD filed a bill of costs, which was eventually referred to a magistrate judge. The magistrate judge issued findings and recommendations,

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[5] When a contractor has finished a portion of work called for in the contract, it submits to the AF a "DD Form 250," which describes the work completed and the amount the AF is to pay for that work.

which the district court reviewed de novo and adopted. The district court then awarded GD $50,271.27 in costs.

II., III.

(9 pages of Jurisdictional Cross-Appeal not copied)

IV.

Turning to the merits, the relators" theory at trial was that GD breached its contract with the AF and provided drawings that did not meet the Level 3 specifications, as evidenced by the fact that they were inadequate for the "build-to-print" contract awarded to Aydin. Thus, GD's submission of DD Form 250's and claims for payment for work described in those forms - if that work did not in fact meet Level 3 specifications - would constitute "false" claims.[10] Central to the merits of this case, therefore, is the question whether GD's drawings satisfied the requirements of contracts "0103" and "0366" that the drawings meet the Level 3 specifications.

A. *The district court did not err in admitting extrinsic evidence to determine the parties' expectations.*

Contracts 0103 and 0366 both required GD to submit "Level 3" engineering drawings. Level 3 is defined by a Department of Defense document entitled "Military Specification: Drawings, Engineering and Associated Lists" and labelled "MIL-D-1000A." Both contracts incorporate MIL-D-1000A by reference.

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[10] The FCA provides that "[a]ny person who . . . knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval . . . is liable to the United Staes Government." 31 U.S.C. § 3729(a).

MIL-D-1000A states that "[e}ngineering drawings and associated lists prepared to this level (Level 3) shall provide engineering definition sufficiently complete to enable a competent manufacturer to produce and maintain quality control of item(s) . . . without additional product design effort, additional design data, or recourse to the original design activity." It further establishes that the intended use for Level 3 drawings is "[t]o provide engineering data for support of quantity production to permit competitive procurement for items substantially identical to original drawings."

Nowhere does MIL-D-1000A state that Level 3 drawings must be error free or adequate to support a "build-to-print" contract. Thus, GD posits, it is impossible to determine, simply by reference to the contracts and to MIL-D-1000A, whether the fact that GD's drawings were inadequate for the follow-on contract means they did not meet the requirements of contracts 0103 and 0366. The district court therefore found that the "contract terms regarding what information had to be contained in the drawings are ambiguous, and the intent of the parties must accordingly be determined with reference to extrinsic evidence."[11]

[5] We agree that extrinsic evidence was properly admitted to flesh out the meaning of "Level 3." "Where . . . . contractual language . . . is unclear and suggests several speculative interpretations, the scope of the language must be read in accordance with the parties" contemporaneous construction, and extrinsic evidence is admissable to show what the parties intended it to mean." *Lockheed Aircraft Corp. v. United States,* 553 F.2d 69, 89 (Ct. Cl. 1977) (citations omitted). Here, the relators claim that language in MIL-D-1000A stating that drawings meeting the Level 3 specifications should allow a

[11] The "extrinsic evidence" consisted of testimony from several witnesses from the AF and from GD and declarations and/or deposition testimony from over 30 declarants/witnesses.

competent manufacturer to build the product without resort to additional engineering *unambiguously* means the same thing as drawings that are sufficient to support a "build-to-print" contract.[12]

[6] MIL-D-1000A, however, is not so precise. It also states, for instance, that the "numbers and types of engineering drawings selected is predicated on sound engineering judgment." As an example, the specification states that a Level 3 drawing for a simple device might only require "a few detailed drawings" whereas Level e drawings for a sophisticated system could require "hundreds of individual drawings." *Id.* Thus, we agree that MIL-D-1000A does not unambiguously define the parties' expectations regarding the degree of accuracy or the suitability for future uses. It certainly does not unambiguously state that Level 3 drawings must be suitable for build-to-print follow-on contracts. We reject the plaintiffs' argument that the district court erred in admitting extrinsic evidence regarding the parties' expectations.

B. The district court did not err in concluding that GD's drawings met the parties' expectations and were therefore not the basis of any "false claims."

Based on the testimony and documentary evidence, the district found that the AF did not intend its contracts to require GD to provide drawings that could be used for follow-on contracts on a build-to-print basis. Rather, the AF "intended to procure from General Dynamics Level 3 drawings only for general Dynamics-built equipment." The court also concluded that "[d]rawings adequate to satisfy the Level 3 requirements of General Dynamics' MUTES

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[12] We note that the relators, perhaps unintentionally, resort to extrinsic evidence to support the contention that the terms are not ambiguous.

contracts are not necessarily adequate to support a build-to-print follow-on contract with a different contractor," and that "General Dynamics' drawings met the Level 3 requirements of its MUTES contracts." We review the district court's findings based on the extrinsic evidence for clear error, and the principles of law applied to those facts de novo. *Stephens v. City of Vista*, 994 F.2d 650, 655 (9th Cir. 1993).

None of these findings is clearly erroneous. One AF officer, for instance, testified in deposition that the government's interest in purchasing the drawings was "to support repair and was to support the acquisition of spare parts," and that "[i]t was generally recognized . . . that Level 3 data rarely supported build-to-print." Another officer, when asked whether data for competitive procurement meant data for a build-to-print contract responded: "No. Data for competitive procurement means enough data to sustain a true level of competition, which can mean a variety of levels of data."

Similarly, evidence amply supports the conclusion that the drawings satisfied GD's contractual obligations to the AF. For example, the AF Program Manager responsible for the MUTES program testified in deposition that "We've been using those drawings for ten or 12 years without any difficulty . . . And I stand by the data. We've been using the drawings and continued to use those drawings. The United States government is very happy with the drawings, and we're going to continue to be happy with them."

[7] We therefore affirm the district court's findings that GD's drawings met the AF expectations and satisfied GD's contractual obligations. Logically, then, any claims for payment based on work that satisfied GD's contractual obligations to the AF could not have been "false or fraudulent" within the meaning of the FCA. We also therefore affirm the district court's conclusion that none of the DD Forms or claims for payment under the MUTES

contracts contained any false claim for payment or fraudulent statement.

V.

Because we conclude that GD did not submit any false claims, we need not reach the question whether it submitted false claims "knowingly" so as to allow liability to attach under the FCA. The FCA imposes liability on "[a]ny person who . . . knowingly presents, or causes to be presented . . . a false or fraudulent claim for payment." 31 U.S.C. § 3729(a)(1). Knowing submission of claims that, as here, are not false or fraudulent, obviously does not give rise to liability.

VI.

After entry of judgment, GD submitted a bill of costs requesting over $200,000 in costs. The clerk denied the bill of costs. GD moved the district court to review the denial of costs. The district court reviewed the denial, ordered costs to be awarded, and referred the matter to a magistrate judge. The magistrate judge disallowed a significant portion of GD's bill of costs and recommended an award of $50,271.27. The district court reviewed the magistrate judge's findings and recommendations, adopted them, and entered judgment awarding costs to GD.

The relators appeal from the district court's order awarding costs. They argue that because the district court had previously declined to award GD attorney's fees and expenses under authority of the FCA upon a finding that the relators' claim was not "frivolous, clearly vexatious, or brought primarily for purposes of harassment," it lacked authority to award costs under Rule 54(d). The relators also argue that, even if the district court did have authority

to award costs, it abused its discretion in doing so. We address these arguments in turn.[13]

A. The district court had authority to award costs under Rule 54.

Rule 54 provides:

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs . . . .

Fed. R. Civ. P. 54(d)(1). The relators contend that the court lacked authority under Rule 54(d) because 31 U.S.C. § 3730 constitutes an "express provision" regarding costs, which displaces the authority the court would otherwise have under Rule 54(d).

Although several subsections of section 3730 *do* expressly mention costs, the subsection governing the relators in this case does not. The relevant subsection states:

> If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable *attorneys' fees and expenses* if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

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[13] We generally review a decision to award costs for an abuse of discretion. *National Info. Servs. Inc. v. TRW, Inc.*, 51 F.3d 1470, 1471 (9th Cir. 1995), amended 52 F.3d 334 (1995). However, whether a district court has the authority to award costs after denying fees and expenses under the FCA is a question of law we review de novo.

31 U.S.C. § 3730(d)(4) (emphasis added). On its face, this subsection does not constitute an "express provision" regarding "costs"; the word "costs" is simply absent from this provision.

[8] Relators, however, suggest that the term "expenses" includes "costs," that this subsection thus *is* an express provision relating to costs, and that the FCA therefore only provides for costs to a defendant who prevails against a relator proceeding on his behalf when the relator's claim is clearly vexatious. Although this question is close, we reject this argument because under the FCA, fees, expenses, and costs are three distinct categories. "Costs," under the FCA, is not a subset of "expenses."

Section 3730(d)(2), for instance, establishes that when a relator proceeds on his own behalf and *prevails* , he shall receive "an amount for reasonable expenses which the court finds to have been necessarily incurred, *plus* reasonable attorneys' fees and costs." 31 U.S.C. § 3730(d)(2) (emphasis added). Similarly, section 3730(g) provides that when the government intervenes but does not prevail, 28 U.S.C. § 2412(d) shall apply. Section 2412(d), as does section 3730(d)(2), distinguishes between fees, expenses, and costs. *See* 28 U.S.C. § 2412(d)(1)(A) ("a court shall award to a prevailing party other that the United States fees and other expenses, *in addition* to any costs") (emphasis added). The language of these two sections strongly suggests that costs, under the FCA, constitute a category distinct from expenses: as a matter of logic, a court could not award costs *in addition* to expenses if costs were merely a subset of expenses.

In a nutshell, then, our analysis is as follows: two other subsections of section 3730 distinguish between expenses and costs and suggest that the two categories are discrete. Section 3730(d)(2) does so explicitly while section 3730(g) does so by reference to another statute. It would therefore be incongruous to conclude that section

3730(d)(4), which refers only to "fees" and "expenses" constitutes an express provision regarding "costs," despite that is silent regarding "costs."

The relators, however, invoke as support for their position several authorities that we find unpersuasive. First, they quote language from *United States ex rel. Kelly v. Boeing Co.* , 9 F.3d 743 (9th Cir. 1993), *cert. denied,* 114 S. Ct. 1125 (1994), which was a constitutional challenge to the qui tam provisions of the FCA. Some language from that opinion would support the position that "costs" are included in the term "expenses" and may only be awarded upon a finding of frivolousness or vexatiousness. *See, e.g.*, 9 F.3d at 749 ("the qui tam plaintiff may be liable for costs if the suit is frivolous"); 9 F.3d at 752 ("a relator who pursues a frivolous action can be ordered to pay the defendant's costs and attorneys' fees").

This language, however, is not a holding. The appellant in *Kelly* raised no issues regarding costs, expenses, or fees, and this court addressed none. The relators' argument relies merely on imprecise word choice in dicta. The language is simply not binding on this panel in this case.

Similarly, other courts addressing other questions have used language that might give rise to an inference that costs are a subset of expenses. *See, e.g., Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 441-42 (1986) ("Section 1920 enumerates expenses that a federal court may tax as a cost under the discretionary authority found in Rules 54(d)."); *but see Hairline Creations, Inc. v. Kefalas,* 664 F.2d 652, 655 (7th Cir. 1981) (" 'costs' are not equivalent to 'expenses,' but include only such items as court fees and witness fees").

[9] These cases are not directly relevant to our inguiry, however. The question in our case is not whether, as a general matter, costs are included in expenses. Rather, the question is much more precise: *under the FCA*, does

the category "expenses" include "costs." Only if it does would section 3730(d)(4)'s provision for fees and expenses constitute an express provision for costs that would replace the discretion to award costs a court would otherwise have under Rule 54(d). Because we conclude that section 3730(d)(4) does not constitute an express provision regarding costs, we hold that the district court did not err in awarding costs under Rule 54.

B. *The district court did not abuse its discretion in awarding costs.*

The relators also argue that even if the district court had authority to award costs, it abused its discretion in doing so. This argument is without merit.

[10] This court recently held:

> The unsuccessful litigant can overcome this presumption [in favor of the award of costs under Rule 54(d)] only by pointing to some impropriety on the part of the prevailing party that would justify a denial of costs . . . A district court therefore must award costs unless the prevailing party is guilty of some fault, misconduct, or default worth of punishment.

National Info. Servs. v. TRW, Inc., 51 F.3d 1470, 1472 (9th Cir.) *amended*, 52 F.3d 334 (1995). The relators list in their brief twelve reasons supporting their assertion that the district court abused its discretion. None of these reasons relates to any impropriety or misconduct by GD. Moreover, the district court, in a written order, considered many of the factors the relators raise on appeal, as well as caselaw guiding the decision whether to award costs, before ordering that GD should recover its costs. Finally, the magistrate judge, whose findings the district court adopted, carefully analyzed GD's bill of costs and reduced

the requested award by over seventy-five percent. We hold that the district court did not abuse its discretion in awarding costs under Rule 54(d).

VII.

We AFFIRM the district court's assertion of jurisdiction (No. 93-16823) and AFFIRM the judgment entered in favor of General Dynamics (No. 93-16823). We also AFFIRM the award of costs (No. 94-16005). Each party shall bear its own costs on appeal.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
————ooOoo————

FILED AUG 5,1993
BY DEPUTY CLERK

UNITED STATES OF AMERICA, ex rel., MURRAY W. LINDENTHAL and DONALD B. WILLIS,

NO. CIV. S-89-1411WBS\JFM

Plaintiffs,

v.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

GENERAL DYNAMICS CORPORATION,

Defendant.

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On September 15, 16, 17, 18, 22, 23, 24, 25, 29, 30 and October 1, 1992 trial was held before this court on Phase I of this case to determine jurisdiction, at which time the court heard the testimony of Murray W. Lindenthal, Donald B. Willis, Frank J. Gaffney, Col. Thomas DeVenny, Larry Kabase, Richard Mitchell, Dr. John Arnold, Peter Mitchell, John Puccione, Dorey Talley, Joseph Giangrosso, James Gavin, Col. Warrick W. Rider, Henry Wolanski, Charlene Ivey, and Charles Schuster, and documentary evidence was received. On October 1, 1992, the court found jurisdiction and stated its findings of fact and conclusions of law orally on the record in open court following the close of evidence on that phase. On February 17, 18, 19, March 3, 4, 5, 30, April 1, 2, 8, 9, 13,

14, 15, 16, 27 28, 29, and 30, 1993, the court received evidence in Phase II to determine the remaining issues in the case, at which time the court heard the testimony of Dorey Talley, Henry Wolanski, Murray W. Lindenthal, Michael Hill, Dr. John Arnold, Donald B. Willis, and John Puccione, and further documentary evidence was received. Pursuant to the Supplemental Pretrial Order of January 26, 1993, the court also received and considered the declaration and/or deposition testimony of Charles Wooten, Melvin Leon Mayes, Richard Adams, Frank J. Gaffney, Loy M. Fraser, Edwin E. Clark, Clifford D. Verwers, Lee Lemay, James E. Pauwels, Bradley M. Rudd, Donald E. Saddoris, Maurice Comeau, Earl Benson, Jerry M. Nimerick, Harry Schuss, Lee Staggs, Richard Endres, Dan P. Fuller, Murray W. Lindenthal, Charlene Ivey, Diane M. Wickstrom, Ralph F. Clements, Donald Tadlock, Donald L. Grskovich, Robert McClendon, Harrell McLemore, Earl Anderson, Creed Thomass Childress, Palle S. Christensen, Col. Thomas DeVenny, James Gavin, Joseph Giangrosso, Col. Warrick W. Rider, Joseph Sullivan, and William Zant.

All objections upon which the court has not already ruled, and all arguments in support of and in opposition to those objections, have been considered by the court as going to the weight of the evidence to which the objections have been made.

The matter was submitted to the court for decision following final arguments on July 26, 1993. The court being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure:

FINDINGS OF FACT

1. Plaintiffs, Murray W. Lindenthal and Donald B. Willis, employees of Aydin Corporation (West), have

brought this action pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. § 3729 et sea., seeking to recover damages on behalf of the United States.

2. Defendant General Dynamics Corporation duly exists under the laws of Delaware and is registered to do business in California.

3. Aydin Corporation (West) is a division of a company engaged in the business of manufacturing electronic and related equipment for the Armed Forces of the United States.

4. In the mid-1970's, General Dynamics first described to the Air Force a concept for a multiple threat emitter systems (MUTES). A MUTES set consists of a tractor cab pulled semi-trailer on which is mounted two house-like structures within each of which are electronic and radar devices capable of transmitting signals I to aircraft and registering signals from aircraft so that in use | a MUTES is located on the ground to simulate the threat of enemy defense forces to air crews, with the crews training by attempting to avoid the simulator threats from the MUTES sets.

5. The Air Force wrote a set of performance specifications based on General Dynamics' concept and conducted a competitive procurement for the award of a contract to develop a prototype unit that could demonstrate the feasibility of the MUTES concept. General Dynamics won that contract. No drawings or reprocurement data were required under the MUTES prototype contract. The successful development and testing of the MUTES prototype ultimately led the Air Force to award to General Dynamics Contract No. F08635-78-C-0103 (hereinafter, "0103").

6. Effective February 10, 1978, General Dynamics and the Air Force entered into Contract 0103 which was signed by Philip R. Cowen, Vice President and Deputy General Manager Contracts, on behalf of General Dynamics on April 11, 1978, and by Major Paul D. Harris

on behalf of the Air Force on April 14, 1978, for the manufacture and supply of the MUTES.

7. Contract 0103 called for General Dynamics to supply certain items to the United States Air Force pursuant to the terms and conditions specified in that contract and to do so, prior to subsequent amendments, for a total amount of $11,500,000. The contract contained a contract data requirement list, item AOOD, specifying the delivery to the Government of "Level 3 data" for at least certain data, including all equipment built by General Dynamics.

8. "Level 3 data" is a phrase used in MIL-D-1OOOA to describe generally drawings of manufactured hardware which contain sufficient detail to enable a technically competent manufacturer to reproduce the relevant hardware items depicted on each drawing by using only the drawings, without undertaking any additional engineering design effort. The extent of data necessary to satisfy 4 MIL-D-1OOOA is tailored through negotiation to fit the needs of a particular procurement. Since MIL-D-1OOOA does not specify the kind of data required to be placed on a Level 3 drawing, the specific data required to be placed on a Level 3 drawing is arrived at by agreement between the government and the contractor.

9. Both prior to and after the award of the 0103 Contract, General Dynamics and the Air Force met regularly and frequently, attempting to reach agreement as to the scope and the specific kind of information that was required to be placed on General Dynamics' Level 3 drawings. The contract terms regarding what information had to be contained in the drawings are ambiguous, and the intent of the parties must accordingly be determined with reference to extrinsic evidence.

10. The Air Force never intended to purchase from General Dynamics drawings that would be used for reprocurement of MUTES systems on a build-to-print

basis. The MUTES which General Dynamics designed and built were purchased by the Air Force buying activity at Eglin Air Force Base in Florida, and were to be maintained by the Air Force's "Red Force Center," which is part of the Logistics Command at McClellan Air Force Base in Sacramento. The drawings were intended to be used by the Red Force Center primarily for its procurement of spare parts. Red Force Center I provided instructions to the program office at Eglin Air Force Base with regard to the kind of information that was required to be in the drawings.

11. The Air Force intended to procure from General Dynamics Level 3 drawings only for General Dynamics-built equipment. For MUTES components and assemblies not built by General Dynamics and not appearing in a vendor catalog, General Dynamics was required to deliver specification control drawings or source control drawings identifying the vendor and/or describing the form, fit and function of the product. General Dynamics' specification control drawings were not required to meet the Level 3 drawing standards of MIL-D-1OOOA. Drawings adequate to satisfy the Level 3 requirements of General Dynamics' MUTES contracts are not necessarily adequate to support a build-to-print follow-on contract with a different contractor.

12. Subsequent to April, 1978, the 0103 Contract was amended from time to time to add at least two additional MUTES sets, and additional specifications, procedures and spare parts.

13. The Air Force regularly monitored and inspected all aspects of General Dynamics' performance of the First Contract, including the continued development of the hardware, whether the performance specifications were being achieved, the manufacture of the hardware, testing and inspection of the hardware, and the preparation of the Level 3 drawings. These functions were carried out by the Air Force's Program, Contracting, and

Engineering Offices at Eglin Air Force Base, the Engineering Department of the Red Force Center at McClellan Air Force Base, and the Air Force Plant Representative Office, where General Dynamics developed and manufactured the MUTES and developed and maintained the drawings.

14. The 0103 Contract set forth a schedule of specific events at which the Air Force would review General Dynamics' performance, including the continued development of the hardware, whether the performance specifications were being achieved, the manufacture of the hardware, testing and inspection of the hardware, and the preparation of the Level 3 drawings.

5. The intent of the Air Force's in-process drawing reviews was to drive major errors from the drawings. What is considered a major error depends on how the drawings are going to be used. In the case of the MUTES drawings, major errors are those errors which would prohibit a competent contractor from reprocuring spares.

16. During 1980 and 1981, the Air Force conducted a series of Physical Configuration Audits in which General Dynamics participated. The Physical Configuration Audits constituted the formal examination and comparison of the MUTES hardware with the Level 3 engineering drawings. The results of the audits were documented in minutes which were transmitted and approved by both General Dynamics and the Air Force. The Audit results and minutes were also disclosed to Bell/Textron Corp., which, at the request of the Air Force, acted as an independent evaluator of General Dynamics' drawings.

17. On August 26, 1981, General Dynamics responded to DR No. 81-3D-391 that its configuration management directives had been rewritten to adequately document the use of non-returnable drawings, and that its quality control engineers had been advised of the importance of obtaining all drawing-related documentation

with the appropriate drawings prior to performing any final inspection operation.

18. During the final Physical Configuration Audit, the Air Force audit team discovered discrepancies between General Dynamics' drawings and the hardware. The Air Force considered some of these discrepancies to be minor in nature, and other discrepancies were noted and disclosed to General Dynamics on individual discrepancy sheets.

19. During the course of the Physical Configuration Audits, the Air Force paid particularly close attention to the drawings depicting the MUTES electronic components (as opposed to mechanical components) and sought to ensure the accuracy of those drawings so as to enable the Air Force to procure spare electronic components based on those drawings.

20. At the completion of the final Physical Configuration Audit in July 1981, despite the presence of some errors in the drawings sampled by the Air Force, the Air Force determined that all of the drawings, whether or not specifically I reviewed during the audit, satisfied General Dynamics' obligation | under the 0103 Contract.

21. Contract No. F08635-82-C-0366 (hereinafter "0366"), entered into by the Department of the Air Force and General Dynamics Corporation, Fort Worth Division, was signed by John P. Sullivan of the United States of America on August 6, 1982, was signed by T.S. Webb, Vice President of the F-16 programs at General Dynamics on July 30, 1982, and had an effective date of August 13, 1982. Contract 0366 called for General Dynamics to manufacture and deliver four more MUTES and to document changes to the MUTES drawings. Under the 0366 Contract, General Dynamics was required to deliver to the Air Force only those drawings that were revised.

22. General Dynamics made approximately 6098 changes to the MUTES data under the 0366 Contract and generated 1580 Engineering Change Notices ("ECNs").

All of the ECNs were incorporated into the MUTES drawings before delivery to the Air Force. All the changes made to the MUTES drawings by General Dynamics were delivered to the Air Force.

23. General Dynamics presented to the Government, contemporaneous with final delivery of each MUTES system, or technical data package ("TDP"), a DD Form 250. A DD Form 250 is a Government form which is presented to the Government by the contractor along with an item that is deliverable under the contract. The Government then inspects the item, and if it is found to be acceptable, the Government signs the DD Form 250 and returns it to the contractor. The contractor then submits the DD Form 250 to its Finance Department so that the cost associated with that item is included in the next request for payment submitted to the Government.

24. A DD Form 250 was furnished by General Dynamics to the Government as supporting documentation accompanying an invoice for final payment on each MUTES and the final TDP. The following invoices were prepared by General Dynamics and presented to the government for payment with DD Form 250s on the following dates:

Invoice at Exhibit	Invoice Date	DD 250 Nr.	DD 250 Date	Item
FW8106257	10/12/81	FWD0332	10/05/81	MUTES S/N2
FW82002840	02/09/82	FWD0453	02/09/82	MUTES S/N3
FW82009487	04/28/82	FWD0545	04/28/82	S/N 4
FW82010384	05/06/82	FWD0379	04/28/82	0103 Data
FW84022809	11/01/84	FWD0062	10/29/84	MUTES S/N 5
F285004117	03/14/85	FWD0067	03/13/85	MUTES S/N 6
FW85015318	06/28/85	FWD0077	06/28/85	MUTES S/N 7
FWD5023379	11/08/85	FWD0102	11/07/85	MUTES S/N 8
FWM86008764	07/14/86	FWD0122	06/09/86	Data S/N 7
FW89000717	01/19/89	FWD0128	08/17/87	Data S/N5,6,8

25. Following General Dynamics' submittal of the drawings and DD Form 250, the Air Force conducted a review and inspection of the drawings to determine whether the drawings contained the kind of information and criteria that the Government required. Following its review of the drawings, the Air Force signed the DD Form 250, and approved and accepted the drawings.

26. The DD Form 250s which General Dynamics submitted to the Air Force along with each deliverable item under the MUTES Contracts were intended to apprise the Air Force that deliverable items were being submitted for acceptance and did not contain any false statement, claim, representation or record. Nor did General Dynamics omit any required information from the forms.

27. General Dynamics' progress payment requests were not false claims, contained no false statement, and did not omit any required information.

28. General Dynamics' invoices were not false claims and contained no false or fraudulent statements. Nor did General Dynamics omit any required information from its invoices.

29. General Dynamics' Program Status Reports, which were submitted only on the 0366 contract were accurate, contained no false or fraudulent statements, did not omit required information, and did not represent a claim for payment.

30. General Dynamics' drawings met the Level 3 requirements of its MUTES contracts. Each of the MUTES systems delivered by General Dynamics to the Air Force satisfied the MUTES performance specifications. The Air Force accepted General Dynamics' TDPs with full knowledge of the condition of the data contained therein, and has been highly satisfied with the performance of General Dynamics' MUTES.

31. There were errors and/or omissions in General

Dynamics' TDPs. However, those errors and/or omissions were no more serious or numerous than those which would be expected to be contained in the data package submitted by any other competent contractor. Moreover, the majority of the errors and/or omissions were not General Dynamics' responsibility. Plaintiffs produced evidence of 54 claimed errors (Exhibit 67), selected not at random but to demonstrate the kinds of errors alleged to be contained in General Dynamics' package. Twenty three of those did not result in any Engineering Change Orders ("ECOs"), four were admittedly not caused by General Dynamics, and another twenty one could fairly be categorized as minor clerical or typographical errors.

32. Although General Dynamics' MUTES Program Manager and Chairman of the Change Control Board, Henry Wolanski, initially believed and testified that approximately 6,000 identified and approved ECNs had been completed and incorporated into the corrected drawings delivered to the Government at the end of Contract 0366, that belief and testimony was based upon an innocent misunderstanding. In fact, there were only ever about 1,500 ECNs identified by General Dynamics.

33. Neither the number nor the nature of the ECNs were sufficient either to place General Dynamics on notice that its TDP did not meet the requirements of the contract or to create any inference that General Dynamics knew that its package did not comply with the contract.

34. General Dynamics did not have any knowledge that its drawings did not comply with its contractual obligation. Nor was General Dynamics deliberately ignorant or in reckless disregard as to the compliance of its drawings with the contract.

35. A TDP for an item as complex as a MUTES contains literally millions of opportunities for error, and it is impossible for current contractor data systems to produce an error free package. Therefore, both General Dynamics and the Government knew that General Dynamics' TDP

was not and could not be error free. However, General Dynamics had no knowledge of any specific errors in its TDP at the time the package was furnished to the Government, nor was General Dynamics deliberately ignorant or in reckless disregard as to the existence of any specific errors in its TDP. Likewise, General Dynamics was not aware of any specific omission of information required for inclusion in its drawings, nor was General Dynamics deliberately ignorant or in reckless disregard as to any such omission.

36. No categories of information were omitted from General Dynamics' drawings. The Air Force's drawing reviews ensured that all questions as to categories of information and the format of the drawings (i.e., where in the drawings certain categories of information would be located), were discussed and resolved between General Dynamics and the Air Force.

37. No obligation existed under the MUTES contracts to deliver to the Air Force "individual notes, notebooks, obsolete drawings, marked up drawings, and other makeshift means of manufacturing the MUTES" prepared by General Dynamics or its subcontractors, as plaintiffs have alleged. .

38. General Dynamics' configuration management and quality assurance functions were carried out properly and in conformity with the MUTES contracts' requirements. The configuration management programs of General Dynamics which were in effect during General Dynamics' performance of the MUTES contracts were submitted to the Air Force and approved by the Air Force as compliant with General Dynamics' contractual requirements. The Air Force had complete knowledge and understanding of General Dynamics' configuration management programs and the manner in which General Dynamics resolved any problems that arose.

39. General Dynamics made reasonable and good

faith efforts to correct deficiencies in engineering practices related to configuration management procedures.

40. At no time did General Dynamics knowingly, consciously or recklessly disregard documenting changes made to MUTES hardware, nor did General Dynamics' Change Control Board at any time discourage the submission of ECNs to document changes or correct drawing errors.

41. As part of General Dynamics' compliance with MILQ9858A, which sets forth general requirements for companies to have a Quality Assurance program capable of detecting and promptly correcting conditions adverse to quality, General Dynamics regularly conducted internal Quality Evaluation Audits to insure that quality deficiencies of any kind would be detected and that recommended corrective actions would be evaluated.

42. When General Dynamics' internal auditors flagged instances of non-compliance with a particular procedure or instances in which a procedure did not satisfy 9858A, that did not mean that General Dynamics was in violation of the entirety of 9858A. Overall compliance with 9858A was assured by having procedures for identifying and correcting those conditions.

43. General Dynamics' internal Quality Evaluation Audits were always available for the Air Force to review. In addition, each Quality Assurance Report that was issued by General Dynamics' Quality inspectors was sent to the Air Force. Each Quality Evaluation Audit that General Dynamics conducted was closed out by corrective actions which were approved by the Quality Assurance department through coordination with the departments that were the subject of the audit.

44. General Dynamics' internal audits do not in any way suggest that Quality Assurance did not perform its inspection and safeguarding role in the proper manner. Nor did the audits conclude that engineers were failing to document changes made to MUTES hardware.

45. Quality Evaluation Audit 79-39 was conducted in 1979 to evaluate the MUTES program's compliance with 9858A. The audit found that there was effective coordination which enhanced the quality aspects of the program and that Quality Control was effectively monitoring the system consistent with established procedures. None of the findings or observations in Quality Evaluation Audit 79-39 indicated in any way that General Dynamics' MUTES drawings were inaccurate or incomplete or that General Dynamics failed to compare MUTES drawings to hardware.

46. Quality Evaluation Audit 81-04 was conducted by General Dynamics in 1981 to audit whether certain engineering laboratories were complying with procedures for controlling drawings. The Air Force was already aware, prior to QEA 81-04, of each of the drawing discrepancies listed in QEA 81-04 which concerned MUTES and the manner in which they were resolved. The observation by the auditor that "parts are being built in reverse order . . . the hardware is built initially, then an ECN is generated to update the drawing to the hardware . . ." does not imply that General Dynamics failed to document changes to the hardware. To the contrary, the statement itself indicates that General Dynamics was documenting such changes through ECNs.

47. The drawing booth in the Design Development Lab was not "uncontrolled" or "out of control", nor did the manner in which it was staffed or maintained violate 9858A or any other requirement in General Dynamics' MUTES contracts, configuration management plan, or any General Dynamics quality control procedure. Nor did the manner in which General Dynamics maintained its drawing booths have any affect on the accuracy or completeness of General Dynamics' MUTES drawings or whether they met Level 3 requirements.

48. General Dynamics' Integrated Circuit Lab

("ICL") was not "out of control." At the time that QEA 81-04 was initially written by Mr. Hill, the auditor, and was reviewed by Dr. Talley, V.P. of Quality, neither Mr. Hill nor Dr. Talley were aware of the procedures that were in place in the ICL. Dr. Talley's handwritten note saying, "out of control," pertained only to the ICL. Following Messrs. Hill, Wooten, and Clark's review of the ICL's procedures, Dr. Tally concluded that the ICL was operating under appropriate controls.

49. In the event that an engineer or technician used an obsolete drawing in building a part, General Dynamics had adequate safeguards to ensure that the part would conform to the latest drawing revision prior to the part being delivered. One of those safeguards was that Quality Assurance inspected every part to the latest drawings. Quality Assurance received the latest drawings immediately upon their release so that they did not use obsolete drawings in their inspections.

50. As a result of QEA 81-04, corrective actions were discussed and implemented to the satisfaction of the Quality Assurance department.

51. QEA 81-12 was an internal audit performed to evaluate how ECNs were being incorporated in the hardware. That audit observed some instances where it could not be determined whether the ECN had been implemented on the hardware. Nothing in that audit suggested that changes were made to hardware without ECNs or that General Dynamics' drawings did not meet Level 3 requirements.

52. QEA 81-34 was conducted primarily to evaluate how quickly released ECNs made their way to the drawing booths. The audit was not an audit of the MUTES program, and none of the drawings that were sampled were MUTES drawings. The statement of the head of the audit group, Charles Wooten, after the initial sampling of drawings, that "an adequate confidence level is not justified" did not in any way refer to the accuracy of

any drawings. That audit did not show that changes were made to MUTES hardware that were not documented. QEA 81-34 was completed and corrective action was implemented with the approval of the Quality Assurance department.

53. Each of the matters raised in General Dynamics' internal audits was closed out to the satisfaction of the Quality Assurance department. Corrective actions were implemented in 1981, and an internal audit (QEA 83-22) conducted in 1983 concluded that there were no instances of non-compliance with 9858A or 1520.

54. In late 1986 and early 1987, the Air Force (through its Sacramento Air Logistics Center at McClellan Air Force Base) initiated an effort to competitively procure additional MUTES sets by way of preparing a solicitation for proposals and circulating that solicitation to possible competitive manufacturers.

55. The solicitation required offering companies to propose to furnish up to fourteen MUTES sets, and related parts and services, based on a TDP included in the solicitation.

56. The Air Force's original intention was to award the follow-on MUTES contract as a performance specification contract, using the drawings as a guide to assist the contractor in meeting the performance specifications. This would have required the contractor to undertake engineering design effort wherever the TDP was inadequate, incomplete, erroneous or referred to obsolete parts, in which case the contractor would have to satisfy the MUTES performance specifications at no additional cost to the government. However, the Air Force, as the result of the decision of contracting officer Diane Wickstrom, ultimately determined to solicit bids on a build-to-print basis.

57. In connection with its solicitation, the Air Force warranted that the TDP was already at a Level 3 status

and that the only drawings that needed to be brought to Level 3 status were new drawings that resulted from a substitution for an obsolete part.

58. General Dynamics did not offer in its unsuccessful proposal or its best and final offer for the follow-on MUTES contract, any assurance or statement or representation that the TDP which the Air Force delivered to potential bidders with its Request for Proposal was suitable for a build-to-print contract for entire MUTES.

59. The Air Force understood that General Dynamics' unsuccessful proposal and its best and final offer for the follow-on MUTES contract were intended to apprise the Air Force only that General Dynamics was prepared to build the follow-on MUTES as requested by the Air Force for a fixed price.

60. General Dynamics' unsuccessful proposal and its best and final offer for the follow-on MUTES contract did not contain any false statement, claim, representation or record.

61. General Dynamics did not have any knowledge of, nor was General Dynamics deliberately ignorant of or recklessly disregard any false statements, claims, representations or records of any information contained in its unsuccessful proposal or its best and final offer.

62. Aydin offered to perform the contract called for by the solicitation for approximately Seventy-Eight Million Dollars ($78,000,000). In response to the solicitation, General Dynamics bid approximately Ninety-Eight Million Dollars ($98,000,000).

63. As a result of this solicitation, on or about March 31, 1987, the Air Force awarded Contact No. F04606-87-D-0002 to Aydin, calling for Aydin to use the TDP to manufacture and deliver up to fourteen MUTES sets with associated parts and services for a basic price of about Seventy-Eight Million Dollars ($78,000,000).

64. Aydin's contract with the Air Force was a "build-

to-print" contract, which meant that Aydin was not permitted to deviate from or change the drawings without Air Force approval. Aydin was thus required to build the MUTES according to the TDP without resort to additional design effort, except for design efforts needed when a part was found to be obsolete. If a drawing was found to be inadequate, incomplete or erroneous, Aydin would not be permitted to change the drawing without going through formal drawing change procedures, including Air Force approval. Such changes to the drawings would also require additional compensation by the Air Force to Aydin.

65. After Aydin was awarded the follow-on MUTES contract, Aydin complained to the Air Force that some of the aperture cards in the TDP which the Air Force had supplied with its Request for Proposal were illegible, out of order and contained non-MUTES cards that did not belong in the MUTES TDP. These problems were caused generally by the Air Force's copying and handling of the aperture cards.

66. To alleviate the TDP's legibility problems, the Air Force, in June 1987, purchased from General Dynamics a legible set of the MUTES aperture cards that were then in General Dynamics' data center (Contract No. F04606-87-M-3621, the "Aperture Card Contract"). The Air Force's need to procure a duplicate set of General Dynamics' drawings was not caused by any deficiencies in those drawings.

67. The Aperture Card Contract did not contain any requirement for Level 3 drawings, and no representations were made by General Dynamics regarding the Level 3 nature of the copies of the drawings submitted under the Aperture Card Contract. Neither the invoice nor the DD Form 250 which General Dynamics submitted to the Air Force under the Aperture Card Contract constituted a false claim.

68. Many of the problems which Aydin had building

the MUTES according to the General Dynamics drawings, were caused by Aydin's decision to use alternate vendors, not deficiencies in the drawings. During the course of Aydin's performance of its contract, the Air Force permitted Aydin to purchase components from vendors who were not identified in the specification control drawings in the MUTES TDP. When a new vendor was approved by the Air Force, the Air Force required that the specification control drawing for that vendor-supplied component had to be changed by means of an ECO. Aydin's election to utilize different vendors, which necessitated changing the specification control drawings, was not caused by any errors or deficiencies in General Dynamics' TDP.

69. In the course of its performance of the MUTES contract, Aydin processed numerous ECOs. Many if not most of them were not caused by deficiencies in General Dynamics' drawing package. For example, during the course of Aydin's performance of its contract, Aydin and its vendors suggested certain changes or improvements in the MUTES hardware. Aydin also sometimes created ECOs to change its own ECOs, and elected to make changes in the parts list and associated list by submitting multiple "administrative" ECOs. Many of Aydin's ECOs due to obsolete parts were outside of General Dynamics' responsibility because they were for vendor-controlled components. In addition, the Air Force often directed Aydin to make certain changes in the MUTES design and to document those changes in ECOs. None of these ECO's were caused by any errors or deficiencies in General Dynamics' drawings.

70. The majority of the ECOs which plaintiffs attribute to General Dynamics' drawing errors were minor in nature, and many were to correct Aydin errors.

71. On May 31, 1989, Aydin and the Government signed modification P00012 to the Aydin Contract which

established a not-to-exceed price increase of Twenty-Two Million Eight Hundred Fifty Thousand, Five Hundred Twenty-Four Dollars ($22,850,524) in consideration for changing the contract from one of build-to-print to one in which Aydin assumed the full risk and cost responsibility for building the MUTES to performance specifications. P00015 subsequently increased the contract price by Twenty One Million Nine Hundred Eighty Nine Thousand, Four Hundred Dollars ($21,989,400), thus fixing the price which had been established by the not-to-exceed P00012.

72. Modifications P00012 and P00015 were necessitated by the decision to award the Aydin contract on a build-to-print basis, and not as a direct result of errors in the drawings or any action or omission of General Dynamics.

CONCLUSIONS OF LAW

1. This court has jurisdiction of this action under the False Claims Act (28 U.S.C. § 1331 and 31 U.S.C. § 3729.et seq.)

2. The 1986 amendments to the False Claims Act are applicable to the trial and decision of this case, even though the pertinent contracts were entered into prior to the 1986 amendments, because some of the documents which plaintiffs allege to have constituted the false claims were submitted to the government subsequent to the 1986 amendments.

3. 31 U.S.C.5 3729(a), as amended provides that: Any person who-

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made

or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any

Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating the subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

4. Under the 1986 False Claims Act amendments, "knowingly," as used in section 3729(a), subsections (1) and (2), is defined as having actual knowledge of the falsity of information, acting in deliberate ignorance of the truth or falsity of the information, or acting in reckless disregard of the truth or falsity of the information. 31 U.S.C. 3729(b).

5. Under the amended False Claims Act, which defines "knowingly" to include "deliberate ignorance" or "reckless disregard" of the truth or falsity of the information, "[t]he requisite intent is the knowing submission of what is known to be false." United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991). "Innocent mistake is a defense to the criminal charge or civil complaint. So is mere negligence." Wand ex rel. United States v. FMC Corp., 975 F.2d 1412, 1420 (9th Cir. 1992).

6. "Deliberate ignorance" describes a state of mind "when the defendant purposely contrives to avoid learning all the facts . . . . [or] willful blindness, where a person suspects a fact, realizes its probability, but refrains from obtaining final confirmation in order to able to deny knowledge if apprehended." United States v. Mapelli, 971 F.2d 284, 286 (9th Cir. 1992). Deliberate ignorance

"differs from positive knowledge only so far as necessary to encompass a calculated effort to avoid the sanctions of the statute while violating its substance." United States v. Pacific Hide & Fur Depot, 768 F.2d 1096, 1098 (9th Cir. 1985), quoting United States v. Jewell, 532 F.2d 697, 704 (9th Cir. en banc), cert. denied, 96 S.Ct. 3173 (1976).

7. "Reckless disregard" means conduct that is "highly unreasonable and represents an extreme departure from the standards of ordinary care to the extent that the defendant must have been aware of it." Hollinger v. Tital Capital Corn., 914 F.2d 1564, 1570 (9th Cir. 1990). Recklessness means "the kind of recklessness that is equivalent to willful fraud and as such, should be viewed as the functional equivalent of intent." Sunstrand Corp. v. Sun Chemical Corn., 553 F.2d 1033, 1045 (7th Cir.) cert. denied, 439 U.S. 875 (1977).

8. Allegations or evidence which amount merely to a condemnation of a government contractor's performance of its contracts, including engineering efforts performed under those contracts, does not rise to the level of fraud or liability under the False Claims Act. Wana ex rel. United States v. FMC Corp., 975 F.2d 1412, 1420 (9th Cir. 1992).

9. "[K]nowledge possessed by officials of the United States may ... show that the defendant did not submit its claim in deliberate ignorance or reckless disregard of the truth." United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991).

10. The contract must be interpreted consistently with the parties' shared intent. See Management Systems Assoc., Inc. v. McDonnell Douglas Corp., 762 F.2d 1161, 1172 (4th Cir. 1985); United States v. Data Translation, Inc., 1992 U.S. App. Lexis 33894 (1st Cir. Dec. 31, 1992) (where government and contractor disputed the meaning of a contract requirement, the court applied a "practical" interpretation rather than one which would turn "nearly

everyone into a rule violator . . . .").

11. Under the contract interpretation shared by General Dynamics and the Air Force, there was no expectation that General Dynamics' drawings would be error-free. The Air Force and General Dynamics recognized this impossibility and applied practical solutions aimed at driving out major or significant errors from the drawings.

12. Under the contract interpretation shared by General Dynamics and the Air Force, decisions about whether General Dynamics' drawings were sufficiently complete and contained information in the proper format were left to be negotiated between General Dynamics and the Air Force program officials during the course of the various drawing reviews that were called out in the contracts.

13. General Dynamics did not deliver drawings to the Air Force or submit any claims for payment with the intent of defrauding the Government. General Dynamics' drawings were not submitted with actual knowledge, "deliberate ignorance" or "reckless disregard" for the completeness or level of accuracy of the drawings.

14. The False Claims Act defines a "claim" as: "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded."

15. None of the DD 250 forms, invoices, or progress payment requests submitted by General Dynamics under the MUTES contracts contained any false claim for payment or fraudulent statement, nor were they used to get a false or fraudulent claim paid, nor were they used to avoid or decrease an obligation to transmit

property to the government.

16. General Dynamics' Quality Assurance Reports, Program Status Reports, and General Dynamics' unsuccessful proposal and best and final offer for the follow-on contract that was awarded to Aydin did not contain any false claims, records or statements, nor were they used to obtain of a false or fraudulent claim paid, nor were they used to avoid or decrease an obligation to transmit property to the Government.

17. General Dynamics did not have actual knowledge of any alleged false information contained in its Quality Assurance Reports, Program Status Reports or in its unsuccessful proposal for the follow-on contract. General Dynamics did not submit those documents to the Air Force with the intent to defraud the government. Nor did General Dynamics submit those documents with deliberate ignorance or in reckless disregard of the truth or falsity of the information contained therein.

18. Plaintiffs are entitled to recover nothing by their complaint.

19. Because the court does not find that plaintiffs' claim was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment, defendant is not entitled to recover attorneys' fees or expenses under 31 U.S.C.S 3730(d)(4).

The Clerk is directed to enter Judgment in favor of General Dynamics Corporation, defendant, and against United States of America, ex rel. Murray W. Lindenthal and Donald B. Willis, plaintiffs, in accordance with these Findings of Fact and Conclusions of Law.

DATED: August 5, 1993 s/ WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

USA, ex rel Murray W Lindenthal, et al

v. CASE NUMBER: CIV S-891411 WBS

General Dynamics Corporation

XX -- **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF August 5, 1993.

Jack L. Wagner,
Clerk of the Court

by: S/
G Miyasato, Deputy Clerk

ENTERED
August 5, 1993

FILED
DEC 8, 1993
UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

———ooOoo———

UNITED STATES OF AMERICA
ex rel., MURRAY W. LINDENTHAL
and DONALD B. WILLIS,

NO. CIV. S-89-1411WBS/JFM

Plaintiffs,

v.

ORDER

GENERAL DYNAMICS CORPORATION,

Defendant.

———ooOoo———

Defendant moves for review of the clerk's September 16, 1993, denial of costs pursuant to Fed. R. Civ. P. 54(d) on the ground that plaintiffs have not satisfied their burden of overcoming the presumption entitling the prevailing party to costs under Fed. R. Civ. P. 54(d). Plaintiffs oppose this motion on several grounds, including: (1) the court's previous denial of expenses under § 3730(d)(4) of the False Claims Act necessarily included a denial of costs; (2) the court should deny costs based upon such factors as the length and difficulty of the case, the misconduct of the defendant, and the inequity that would result from an award of costs; and (3) the bill of costs filed by defendant is excessive and insufficiently documented.

BACKGROUND

After several years of litigation beginning in 1989, and culminating in a trial between September 15, 1992 and April 30, 1993, this court filed its findings of fact and conclusions of law on August 5, 1993, ordering judgment in favor of the defendant. Defendant lodged its Bill of Costs pursuant to Local Rule 292 on August 23, 1993. For reasons which are unclear, apparently because plaintiff filed objections requiring the determination of legal issues, on September 16, 1993 the clerk taxed the costs in the amount of 0. Defendant has timely moved for review of the clerk's action.

DISCUSSION

Defendant seeks to recover its costs as the prevailing party pursuant to Fed. R. Civ. P. 54(d), which provides:

> "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs..."

Fed. R. Civ. p. 54(d).[1] Whether costs are awarded is a

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[1] Plaintiff's argument that Rule 54(d) does not apply because the court's previous denial of expenses under 31 U.S.C. § 3730(d)(4) necessarily included a denial of costs is without merit. Costs and expenses are not synonymous, as costs generally include only those amounts paid for items specified in 28 U.S.C. § 1920. Hairline Creations. Inc. v. Kefalas, 664 F.2d 652, 655-56 (7th Cir. 1981). Furthermore, expenses and costs are distinguished elsewhere in the False Claims Act. See 31 U.S.C. § 3730(d)(2). Expenses not X properly taxable as "costs" are considered "expenses". Dickerson v.

decision within the discretion of the district court. K-2 Ski Company v. Head Ski Co., Inc., 506 F.2d 471, 476-77 (9th Cir. 1974).

Under Rule 54(d) there is a presumption that the prevailing party should recover costs, Horning v. Washoe County, 108 F.R.D. 364, 365 (D. Nev. 1985); True Temper Corp. v. CF & I Steel Corp., 601 F.2d 495, 509-510 (10th Cir. 1979); Gardner v. Southern RY. Systems, 675 F.2d 949,954 (7th Cir. 1982), and ordinarily some reason must appear to penalize a **party** if costs are denied. Horning, 108 F.R.D. at 365; see Subscription T.V. v. Southern Cal. Theater Owners, 576 F.2d 230, 234 (9th Cir. 1978) (district court must state reasons for denying costs).

Although this court found that plaintiff's suit was not frivolous, an award of costs is not limited to clearly frivolous actions. See Nat. Organization for Women v. Bank of California, 680 F.2d 1291, 1294 (9th Cir. 1982). Furthermore, the presumption of awarding costs to the prevailing party is not overcome solely because the other party acted in good faith. Schaulis v. CTB/McGraw-Hill Inc., 496 F. Supp. 666, 680 (N.D.Ca. 1980) (citing Popeil Brothers. Inc. v. Schick Electric. Inc., 516 F.2d 772, 776 (7th Cir. 1975); Maldonado v. Parasole, 66 F.R.D. 388, 390 (S.D.N.Y. 1975)).

Plaintiffs argue that the court should consider such factors as the length and difficulty of the case and the inequitable result of placing the burden of costs on the

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Pritchard, 551 F. Supp. 306, 312 (W.D. Ark. 1982) (cited by plaintiff). Therefore, a court may deny certain expenses while S granting others as costs. A motion for costs under 28 U.S.C. § 1920 is governed by Rule 54(d). Crawford Fittina Co. v. J.T. I Gibbons. Inc., 482 U.S. 437, 441-42 (1987).

plaintiffs.[2] A court may consider the fact that a case was "well founded and its resolution a close question" in denying costs, Agarwal v. Arthur G. McKee and Co., 644 F.2d 803, 807 (9th Cir. 1981) (affirming district court's denial of costs on these grounds); see White & White, Inc. v. American Hosp. Supply Co., 786 F.2d 728, 732 (6th Cir. 1986) (considering length and difficulty of case as factor in denying costs), as well as the inequity that may occur as a result of plaintiffs limited budget. Nat. Organization for Women v. Bank of California, 680 F.2d 1291, 1294 (9th Cir. 1982) (district court did not abuse its discretion in considering plaintiffs' budgets); Schaulis, 496 F. Supp. at 680 (award of costs would be undue burden to individual litigant when case was closely litigated); compare Hudson v. Nabisco Brands, Inc., 758 F.2d 1237, 1244 (7th Cir. 1985) ("a general rule that disparate wherewithal alone would defeat a claim for costs would upset the dictates of rule 54(d?...").

Although this case was closely litigated and an award of costs would be a burden to the qui tam plaintiffs, the court has considered these factors and finds that they are insufficient reasons to overcome the presumption in favor of awarding costs to defendant as the prevailing party. However, before the court determines the amount of costs, plaintiffs will be given time to file detailed objections to defendant's proposed costs.

IT IS THEREFORE ORDERED that defendant recover its costs of suit pursuant to Fed. R. Civ. P. 54(d). Plaintiffs are given thirty (30) days from the date of this Order to file detailed, line-item objections to defendant's cost bill. Any such objections shall be presented to the

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[2] The court will not consider plaintiff's argument that defendant's misconduct during the litigation should be considered because the court did not conclude that defendant was guilty of misconduct.

magistrate judge for findings and recommendations.

DATED: December 7, 1993

s/_____
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ex rel. MURRAY W. LINDENTHAL; DONALD B. WILLIS,

Plaintiffs-Appellants,

v.

GENERAL DYNAMICS CORPORATION,

Defendant-Appellee.

FILED
OCT 4, 1995

Nos. 93-16690 & 94-16005
D.C. No. CV-89-01411-WBS

ORDER

Before: HALL, WIGGINS, and LEAVY, Circuit Judges

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en bane and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

JA
U. S. ex rel Lindenthal v. General Dynamics

SAF/GCP (Mr. Vincent)
Washington, D.C.20330-1000

1. This letter follows up on several conversations between your office and Mr. Hamilton of this office. We have already forwarded supporting documentation as it was received from Mr. Jacobs, the private attorney for Murray Lindenthal and Donald Willis in the referenced case. You have asked for our position on the question of whether the United States should enter the Lindenthal case. We join with legal counsel from Eglin AFB in recommending entry into the case.
2. The initial decision not to enter the case was based on an expedited investigation by our local OSI office. In that investigation contact was made with the current project manager for the MUTES program. He expressed his opinion that the data purchased under the MUTES contract with General Dynamics was solely for purchase of spare parts, not competitive reprocurement of MUTES systems. The contracting officer at the time of that initial investigation had no opinion on that issue. Additionally, in initial review of the case questions arose concerning whether a false claim case could be made when the Air Force had accepted the data from General Dynamics, presumably after inspection. Further, even if such a case were feasible, the amount of damages appeared to be speculative since there was no clear contractual provision which specified the amount paid solely for the data.
3. This office aided Mr. Jacobs in obtaining further contract review and witness interviews after the initial OSI investigation. We personally interviewed the contracting officer who actually procured the data in 1982. Further, we examined the contract file to determine the Air Force's

involvement in inspection of the data. Based on our interviews and examinations, we learned that there is clear documentation and readily available testimony to establish that the Air Force intended to purchase data to subsequently reprocure MUTES systems on a competitive basis. Further, the data is so voluminous that it was not inspected by the Air Force. Instead, it was simply accepted. Errors in the data attributable to General Dynamics account for at least 960 engineering change orders by the successor contractor, Aydin, at a cost of over $21 million. Testimony from an engineer who formerly worked for General Dynamics and who has since retired shows that General Dynamics' management directed its engineers to stop documenting errors to the data being given to the Air Force. This lack of documentation corresponds directly to the engineering change orders now being paid for by the Air Force.

4. Based on the foregoing, we respectfully suggest that the initial OSI investigation led to an incorrect decision. Accordingly, we believe good cause exists to move for permission of the court to enter the case.

5. Questions should be directed to Mr. Hamilton at extension 3-5123.

JAMES L. DONAT, Lt. Col. USAF
Acting Staff Judge Advocate

FEB 21 1996
CLERK

No. 95-1167

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *ex rel.*
MURRAY W. LINDENTHAL; DONALD WILLIS

Petitioners,

v.

GENERAL DYNAMICS CORPORATION

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

General Dynamics takes issue with the questions presented in the petition, which merely summarize petitioner's arguments. General Dynamics believes the questions to be as follows:

1. Is an award of "costs" under Fed.R.Civ.P. 54(d) to the prevailing defendant in a *qui tam* action brought under the civil False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, precluded by 31 U.S.C. § 3730(d)(4), which provides for an award of attorneys' fees and expenses if the action is proved to be "clearly frivolous?"

2. Did the courts below err in concluding that General Dynamics did not submit any false claims to the government?

PARTIES TO THE PROCEEDING

The petition did not identify the parties to the proceeding. The parties are pro se petitioner Donald B. Willis (hereafter referred to as "Mr. Willis") and respondent General Dynamics Corporation ("General Dynamics"). It appears that Murray W. Lindenthal, a co-plaintiff in the action below, is not a party to this proceeding.

For purposes of further clarification, General Dynamics notes that this action was brought under the so-called *"qui tam"* provisions of the civil False Claims Act (31 U.S.C. § 3730), which enable a private citizen (often referred to as a "relator") to bring a false claims action on behalf of the federal government. The United States, which is identified in the case caption, has a right of intervention in all *qui tam* actions. In this action, "[t]he relators prosecuted the action on their own after the Government declined to intervene." Petition Appendix A-2 (Ninth Circuit Opinion). Pursuant to the government's request -- and as reflected on the proof of service -- the parties serve copies of all filed papers upon the government, even though the government is not a party to the proceeding.

CORPORATE DISCLOSURE STATEMENT

Respondent General Dynamics Corporation has no parent company, subsidiaries or affiliates which have issued shares to the public.

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STATUTORY PROVISIONS

(*Not already noted in the petition*)

The Civil False Claims Act, 31 U.S.C. §§ 3729 *et seq.*

§ 3729. False Claims

(a) Liability for certain acts. Any person who --

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval . . .

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person . . . .

(b) Knowing and knowingly defined. -- For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information --

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no specific intent to defraud is required.

STATEMENT OF THE CASE

Petitioner Willis, along with his co-plaintiff, Mr. Lindenthal, brought this *qui tam* action alleging that General Dynamics defrauded the government under the civil False Claims Act, 31 U.S.C. §§ 3729 *et seq.*1/ Mr. Willis' claims arose from General Dynamics' submission of a technical data package to the Air Force which Mr. Willis believes was non-compliant with General Dynamics' contractual requirements. The courts below found that Mr. Willis' claims were unsupported, and in any event amounted merely to a condemnation of General Dynamics' performance -- an allegation which is not actionable under the False Claims Act which requires proof that a defendant knowingly submitted to the government that which it knew to be a false or fraudulent claim for payment. The court also awarded costs to General Dynamics under Fed.R.Civ.P. 54(d). Mr. Willis, without presenting any authority in support of his views, nor any conflict in the law, now requests that the Court grant certiorari to consider reversing those decisions.

At issue was a contract between the Air Force and General Dynamics for the development and production of eight mobile, ground-based radar systems called MUTES (Multiple Threat Emitter Systems), a highly complex set of electronic components that are used to train Air Force pilots by simulating and emitting signals to pilots which duplicate those of an enemy attack. The contract also called for delivery to the Air Force of a technical data package reflecting the MUTES design. Some, but not all of the MUTES components were to be depicted in the technical

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1/ The history, background and legislative purpose behind the *qui tam* provisions of the False Claims Act are summarized in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991).

data package by engineering drawings prepared in accordance with a military specification called "Level 3" which would enable the Air Force to use those drawings later on to buy additional components through competitive bidding.2/

During the course of General Dynamics' performance, the Air Force reviewed, audited and evaluated the technical data package, including the Level 3 drawings to determine whether it was satisfactory. Deficiencies, i.e., drawing errors and areas of inadequate descriptive detail, were noted by the Air Force and corrected by General Dynamics to the satisfaction of the Air Force which accepted the technical data package. Petition Appendix B-5 to B-8.

The Air Force later used the General Dynamics' technical data package to purchase spare component parts from General Dynamics and other contractors through competitive bidding. The Air Force also used the technical data package as the basis for a competition for a contract to build fourteen additional MUTES systems. That contract was won by Aydin Corporation, for whom Mr. Willis was employed as an engineer. Aydin's contract required it to rely exclusively upon the technical data package the Air Force

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2/ Level 3 is described in a military specification called MIL-D-1000A which states in pertinent part that Level 3 drawings "shall provide engineering definition sufficiently complete to enable a competent manufacturer to produce . . . item(s) . . . interchangeable with those of the original design . . . without resorting to additional product design effort . . . ." The specification further states that Level 3 drawings shall: "reflect the end product . . . provide the engineering data for the support of quantity production . . . [and] provide the necessary data to permit competitive procurement . . . of items substantially identical to the original item(s) . . . ." *See* district court's paraphrasing of this specification at Petition Appendix B-4.

received from General Dynamics. This is referred to as a "build-to-print" contract, which requires the contractor to build the product precisely according to the technical data package supplied by the government, and requires the government to pay additional sums every time the contractor has to change a drawing because of an error or omission. Petition Appendix A-4.

According to Mr. Willis, Aydin encountered difficulty in manufacturing the MUTES because the technical data package lacked sufficient information to manufacture all of the components, and some of the drawings contained errors. The Air Force agreed to increase the price of Aydin's contract in exchange for converting the contract from requiring Aydin to "build-to-print" to one which obligated Aydin to produce MUTES that satisfied the Air Force's performance requirements. This is referred to as a "performance specification" contract which obligates the contractor to produce a system, for the contract price, that meets the performance requirements of the contract, regardless of whether the technical data package -- which is supplied merely as a guide -- is accurate and complete. Petition Appendix A-4.

Mr. Willis filed this action alleging that the amount of money which the Air Force paid to Aydin in accordance with converting Aydin's contract to a performance specification contract constituted damages incurred by the United States as a direct result of General Dynamics providing a deficient technical data package to the Air Force. Mr. Willis, who was not a party to the contracts between General Dynamics and the Air Force, nor involved in any way in those contracts, alleged (and restates in his petition) that General Dynamics was required to provide a technical data package that would be sufficient for another contractor to build *entire* MUTES systems under a build-to-print contract. Since the technical data package ultimately was not used in that manner, but was instead used first by the Air Force to buy spare parts and then as a guide to assist Aydin in building entire MUTES systems under a performance specification contract, Mr. Willis

asserted that General Dynamics must have defrauded the government.

In essence, Mr. Willis would hold General Dynamics liable under the False Claims Act -- which imposes liability (in the form of treble damages and penalties) on one who "knowingly presents, or causes to be presented . . . a false or fraudulent claim for payment" (31 U.S.C. § 3729(a)(1)) -- solely on the theory of deficient performance under a government contract. Mr. Willis views the primary issue of this case as one of contract interpretation. According to Mr. Willis, since General Dynamics' technical data package did not meet Mr. Willis' own interpretation of General Dynamics' contract requirements, the submission of the technical data package was a per se violation of the False Claims Act.

The courts below disagreed with Mr. Willis' factual assertions about General Dynamics' contract requirements and its performance, finding: (a) General Dynamics' technical data package, including the Level 3 drawings, met the Air Force's expectations despite the presence of a small number of minor errors, (b) the technical data package was never intended to be used for building entire MUTES systems on a build-to-print contract (in part because the contract did not require Level 3 drawings for the entire MUTES system), and (c) General Dynamics did not knowingly or recklessly submit any false information to the government in connection with the technical data package or in connection with anything else. Accordingly, the courts found that the technical data package was not the basis of any "false claims" (Petition Appendix A-8). In support of that finding, the courts relied upon the Air Force's own acknowledgment that it originally intended the Aydin contract to be a performance specification contract, not a build-to-print contract, and that the decision to convert it back to a performance specification contract was not caused by any act or omission of General Dynamics. Petition Appendix B-19.

The courts also disagreed with Mr. Willis' legal theory, holding, as a matter of law:

> Allegations or evidence which amount merely to a condemnation of a government contractor's performance of its contracts, including engineering efforts performed under those contracts, does not rise to the level of fraud or liability under the False Claims Act.

Petition Appendix B-22 (*citing Wang ex rel. United States v. FMC Corporation*, 975 F.2d 1412, 1420 (9th Cir. 1992).

In his petition, Mr. Willis asserts that the courts erred in not adopting his interpretation of General Dynamics' contract requirements. He disagrees with the finding that General Dynamics met the government's expectations, maintaining it was based on Air Force testimony of "questionable admissibility." Furthermore, Mr. Willis continues to ignore the elements of proof required to establish liability under the False Claims Act. His petition -- like his case at trial -- is devoid of any evidence that General Dynamics violated the False Claims Act. As discussed below, Mr. Willis' factual and legal assertions are unsupported, and his petition presents no grounds for reviewing the case on the merits.

Following the district court's entry of judgment in favor of General Dynamics (Petition Appendix B), General Dynamics submitted a bill of costs totaling $246,321.00, consisting of standard categories of recoverable costs, including clerk fees, service and subpoena costs, court reporter/transcript costs, witness fees, exhibit copying costs, and costs incident to the numerous discovery and trial depositions which occurred. Relators presented line-item objections, and the court, after examining in detail the categories and amounts claimed, ordered an award of costs under Fed.R.Civ.P. 54(d) in the amount of $50,271.27. Petition Appendix A-10.

Mr. Willis does not question the sufficiency of proof with regard to the costs; nor does he contest the categories of costs or the particular amount of the award. Rather, he asserts, without any supporting authority, that costs under Rule 54(d) are expressly precluded by the False Claims Act's provision for "attorneys' fees and expenses" (31 U.S.C. § 3730(d)(4)), and that General Dynamics, therefore, was not entitled to recover any of its costs.[3/]

The petition presents no conflicting authorities on either question presented; therefore, there is no basis for granting a writ of certiorari.

REASONS FOR DENYING THE PETITION

For convenience, the two questions are presented below in the same order in which they were presented in the petition.

I.

THE AWARD OF COSTS UNDER RULE 54(d)(1) WAS PROPER

Petitioner Willis contests General Dynamics' entitlement to costs under Rule 54(d)(1), which provides that costs are allowed as of course to the prevailing party "[e]xcept when express provision therefor is made . . . in a statute . . . ." He asserts that section 3730(d)(4) of the False Claims Act -- which provides for an award of "attorneys' fees and expenses" to a defendant if the qui tam relator's claim is proved to be frivolous -- is an express provision that

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3/ Mr. Willis' petition drops the argument, raised with and rejected by the Ninth Circuit, that even if the district court had authority to award costs, it abused its discretion in doing so. Petition Appendix A-14.

displaces the authority the court would otherwise have under Rule 54(d). Since the district court did not find the action to be frivolous, and therefore, did not award General Dynamics its attorneys' fees and expenses (Petition Appendix B-24), Mr. Willis asserts that the court had no authority under Rule 54(d) to award costs.

While on its face, section 3730(d)(4) provides expressly for attorneys' fees and expenses and does not contain any provision regarding "costs," Mr. Willis suggests that the term "expenses" used in section 3730(d)(4) is the same as the term "costs" used in Rule 54(d). Accordingly, Mr. Willis believes that a prevailing defendant in a qui tam action is entitled to recover its costs only if it defendant proves the relator's action to be frivolous.

As the Ninth Circuit opinion correctly held:

> . . . we reject this argument because under the FCA, fees, expenses, and costs are three distinct categories. 'Costs,' under the FCA, is not a subset of 'expenses.'

Petition Appendix A-12.

Mr. Willis' petition repeats the unsupported arguments made below, first pointing to cases in which courts used the term "costs" in a way which appeared to Mr. Willis to be interchangeable with the term "expenses." Petition, p. 9. However, as the Ninth Circuit noted, none of those cases raised any issue whatsoever regarding the award of costs. Therefore, those decisions simply do not support Mr. Willis' view. Petition Appendix A-13. He further claims that "all prior district courts have denied such costs to prevailing defendants," but he does not cite any such decision. Accordingly, there is not a single conflicting decision upon which to base the petition for certiorari.

Mr. Willis further contends that since Congress, in amending the False Claims Act in 1986, intended to

encourage more relators to bring qui tam actions, they did not intend to penalize relators with liability for defendants' costs, except where their action was frivolous.4/ Again, there is no citation to any legislative history to support that view.

In fact, there is nothing either in the express language or in the underlying intent of the False Claims Act, that precludes a prevailing defendant from recovering Rule 54(d) costs against a relator. Congress has passed "express provisions" denying successful litigants recovery of costs. *See, e.g.*, 15 U.S.C. § 77v(a) (Securities Act) ("No costs shall be assessed . . ."); 15 U.S.C § 78 (Securities Exchange Act); 15 U.S.C. § 79 (Public Utility Holding Company Act), and 28 U.S.C. § 2465. But in each instance, Congress has used the precise term "costs" when crafting the limitation on Rule 54. In enacting the 1986 amendments to the False Claims Act, Congress undoubtedly would have specifically crafted the Act to limit a prevailing defendant's entitlement to costs if that had been their objective.

Mr. Willis' efforts to convey an "interrelationship of the terms fees, expenses and costs" based on his review of

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4/ Mr. Willis suggests that the award of costs is an unjust penalty, given the court's finding that his action was not clearly frivolous. That perspective is misplaced. Denial of costs to a prevailing party -- even in a case brought in good faith and closely litigated -- is an abuse of discretion unless the unsuccessful party proves that prevailing party is guilty of some fault, misconduct, or default worthy of punishment. *See, National Information Services, Inc. v. TRW, Inc.*, 51 F.3d 1470, 1472 (9th Cir. 1995) (denial of costs is a penalty against the prevailing party). *Smith v. Southeastern Penn. Transp. Auth.*, 47 F.3d 97, 99-100 (3d Cir. 1995) (*per curiam*); *Serna v. Manzano*, 616 F.2d 1165, 1167 (10th Cir. 1980). Accordingly, the award of costs is not so much a penalty against Mr. Willis, as the denial of costs would be characterized as a penalty against General Dynamics.

"hundreds of authorities and literature" (Petition, p. 11) is without legal support.[5/] The clear distinction between "costs" and "expenses" was articulated by the district court:

> Costs and expenses are not synonymous, as costs generally include only those amounts paid for items specified in 28 U.S.C. § 1920.[6/] *Hairline Creations, Inc. v. Kefalas*, 664 F.2d 652, 655-56 (7th Cir. 1981). . . . Expenses not properly taxable as "costs" are considered "expenses." *Dickerson v. Pritchard*, 551 F. Supp. 306, 312 (W.D. Ark. 1982) (cited by plaintiff[s]). Therefore, a court may deny certain expenses while granting others as costs. A motion for costs under 28 U.S.C. § 1920 is

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5/ Mr. Willis also asserts that when he commenced this action, he did not intend to risk liability for defendant's costs, asserting that he could not possibly have been aware of potential liability for costs under Rule 54(d), which he characterizes as "some obscure undesignated rule." Petition, p. 9. Notwithstanding the irrelevance of Mr. Willis' intent, General Dynamics notes that Mr. Willis was represented by counsel from the time of commencing his action through the award of costs.

6/ 28 U.S.C. § 1920 states that a judge or clerk of any court of the United States may tax as costs the following: fees of the clerk or marshal; fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; fees and disbursements for printing and witnesses; fees for exemplification and copies of papers necessarily obtained for use in the case; and docket fees. These are the categories of costs recovered by General Dynamics. They are far more narrow and distinct from the "expenses" which were incurred and which would have been awarded under section 3730(d)(4) had the court found the action to be frivolous.

> governed by Rule 54(d). *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441-42 (1987).

Petition Appendix D-2 to D-3.

Furthermore, as the Ninth Circuit opinion noted, the distinction between expenses and costs is evident in the False Claims Act itself.

> Section 3730(d)(2), for instance, establishes that when a relator proceeds on his own behalf and *prevails*, he shall receive "an amount for reasonable expenses which the court finds to have been necessarily incurred, *plus* reasonable attorneys' fees and costs." 31 U.S.C. § 3730(d)(2). Similarly, section 3730(g) provides that when the government intervenes but does not prevail, 28 U.S.C. § 2412(d) shall apply. Section 2412(d), as does section 3730(d)(2), distinguishes between fees, expenses, and costs. *See* 28 U.S.C. § 2412(d)(1)(A) ("a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs"). The language of these two sections strongly suggests that costs, under the FCA, constitute a category distinct from expenses: as a matter of logic, a court could not award costs *in addition* to expenses if costs were merely a subset of expenses.

Petition Appendix A-12 (emphasis in opinion). Since the False Claims Act distinguishes between expenses and costs, the Ninth Circuit correctly held that it would be "incongruous to conclude that section 3730(d)(4), which refers only to 'fees' and 'expenses' constitutes an express provision regarding 'costs,' despite that it is silent regarding 'costs.'" Petition Appendix A-13.

The statutes and rules cited above make it clear that an award of costs under Rule 54(d) is distinct from an award of attorneys' fees and expenses under section 3730(d)(4) of the False Claims Act. Petitioner Willis lacks support for his contention that such costs are expressly precluded by the False Claims Act. Accordingly, his arguments are without merit and present no legal conflict upon which to grant a writ of certiorari.

II.

GENERAL DYNAMICS DID NOT VIOLATE THE FALSE CLAIMS ACT

A. Mr. Willis' Claim Merely Condemns General Dynamics' Performance Under Its Contracts Which Is Not Actionable Under the False Claims Act

The False Claims Act is not a remedy for challenging a contractor's performance under a government contract. Performance issues are matters of contract administration which are left to the sole discretion of the government, and are not within the purview of the False Claims Act. To prove liability a plaintiff must prove that a defendant knowingly submitted a false or fraudulent claim for payment or made false statements knowing them to be false, thereby cheating the government. *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991). Indeed, the civil False Claims Act has been referred to as a fraud statute that is "quasi-criminal" in nature. *See, e.g., United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 460 (5th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978); *United States v. Halper*, 490 U.S. 435, 449-50 (1989) (applying double jeopardy analysis to penalty provision).

The False Claims Act defines the "knowing" submission of a false claim as "actual knowledge," "deliberate ignorance," or "reckless disregard" of the falsity

of the information, definitions which uniformly require a showing of much more than mere negligence. 31 U.S.C. § 3729(b).7/ Courts have further defined the standard of liability under the False Claims Act. "The requisite intent is the knowing presentation of what is known to be false . . . . Innocent mistake is a defense to the criminal charge or civil complaint. So is mere negligence." *Hagood, supra,* 929 F.2d at 1421.

Applying this standard, courts have held, as did the district court in this action (Petition Appendix B-22), that allegations or evidence which amount merely to a condemnation of a government contractor's performance of its contracts, including engineering efforts performed under those contracts, do not rise to the level of fraud or liability under the False Claims Act.

In *Wang ex. rel. United States v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992), the court found that False Claims Act liability could not be established when allegations amounted to nothing more than criticisms of defendant's engineering efforts. There, the *qui tam* plaintiff alleged that defendant's engineers made faulty calculations, lacked engineering insight and produced a defectively designed product. *Id.* at 1420-21. The court, taking the allegations as true, held that the alleged conduct might constitute a mistake or even negligence, but found that there was no evidence that

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7/ The district court also relied upon the correct definition of "deliberate ignorance" and "reckless disregard." *See* Petition Appendix B-21 to B-22, *citing United States v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1993) ("deliberate ignorance" means purposely contriving to avoid learning true facts or "willful blindness"), and *Hollinger v. Title Capital Corp.*, 914 F.2d 1564, 1570 (9th Cir. 1990) ("reckless disregard" means conduct that represents an extreme departure from the standards of ordinary care to the extent that the defendant must have been aware of it).

defendant showed deliberate ignorance of false claims for payment based on its contract performance: "Proof of ones mistakes or inabilities is not evidence that one is a cheat" and "bad math is no fraud." *Id.*

Mr. Willis' allegations amount merely to criticisms of General Dynamics' drawing preparation and engineering efforts. Thus, even if he had proved that General Dynamics' technical data package was non-compliant with its contract -- which, as discussed below, he did not prove -- he offered the courts below no evidence which could have given rise to liability under any of the standards set forth in the False Claims Act. As discussed below, his petition is similarly devoid of such evidence.

B. Mr. Willis Presented No Credible Evidence To Support Either His Interpretation of General Dynamics' Contract Requirements Or His Claims Of Deficient Performance

Notwithstanding that Mr. Willis' underlying premise of deficient performance does not rise to the level of fraud or liability required under the False Claims Act, that premise is itself unsupported. The courts below found that no false claims had been made and that General Dynamics' performance was squarely within the Air Force's contract requirements and expectations. Nothing in Mr. Willis' petition casts doubt on that holding.

First, Mr. Willis asserts that the Level 3 specification unambiguously required the submission of drawings adequate for building MUTES systems on a build-to-print contract. (And, according to Mr. Willis, since the technical data package was not put to that use, General Dynamics must have defrauded the government.) Yet the Ninth Circuit, quoting the pertinent language from the specification, correctly held that it does not contain the words "build-to-print." "Nowhere does MIL-D-1000A state that Level 3 drawings must be . . . adequate to support a 'build-to-print' contract." Petition Appendix A-7. Thus, while Mr. Willis

asserts on the one hand that the specification is unambiguous and not subject to interpretation, the meaning he attributes to the specification is not found on its face; rather it is a product of his (erroneous) interpretation.8/

In addition, Mr. Willis' interpretation is not supported anywhere else in the record.9/ He fails to cite any testimony or evidence which supports his view. His general references to one witness, Col. Schuster, and a so-called "interpretation

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8/ Mr. Willis cites a finding of fact from a decision by the Armed Services Board of Contract Appeals for the proposition that "Level 3" means "build-to-print." Petition, p. 12 (*citing General Atronics Corporation*, ASBCA No. 37923, 91-3 BCA ¶ 24, 047 (1991)). There, the Board made a determination based on the facts in that case, including the intended use for the drawings that General Atronics was to provide, and did not suggest that all Level 3 drawing packages must be capable of being used on a build-to-print basis. As noted *infra*, the Air Force witnesses in the instant case testified that Level 3 drawings have different requirements depending on how the drawings are to be used.

9/ In fact, the Air Force witnesses testified that the Level 3 specification is by nature ambiguous. Joseph Giangrosso, the Air Force Program Manager for the MUTES program, testified, "the military specification for Level 3 does not tell the contractor or the Air Force everything that needs to go into the drawings. It leaves a lot to be interpreted." Similarly, Col. Thomas Devenny, head of the Air Force division which oversaw the MUTES program, testified that a Level 3 requirement only "sets a framework or spectrum. . . . [t]here is a wide range of alternative points within the system." In addition, Dr. John Arnold, the former chief civilian in Air Force Range Systems (the office responsible for the MUTES program), testified that MIL-D-1000A does not specifically tell a contractor every piece of information that is required for the drawing; rather, it only gives the contractor a feeling of the breadth of information required.

agreement" are not supported with citations or quotations because the record does not reflect Mr. Willis' assertions.

The record reflects the overwhelming evidence presented by General Dynamics and the Air Force, as to the meaning of their contract, including the Level 3 specification. First, the contract required Level 3 drawings for only General Dynamics-built equipment and not for components bought from vendors. Petition B-5. Mr. Willis never disputed that contract provision. Thus, even if Mr. Willis were correct that Level 3 means "build-to-print," he ignores the fact that not all of the drawings were required to be Level 3, and therefore, the technical data package as a whole could not possibly have been a "build-to-print" package.

Next, the Air Force witnesses testified that the technical data package was intended to be used by the Air Force to buy spare parts through competitive bidding, and not for buying entire MUTES systems on a build-to-print basis. Petition Appendix A-9; B-4 to B-5.10/ Mr. Willis himself quotes Air Force personnel who oversaw the MUTES program as saying that the technical data package was not intended for building MUTES systems on a build-to-print basis, but he fails to rebut that testimony. Petition, pp.

10/ The court relied upon the testimony from Col. Devenny, who stated that while MIL-D-1000A defines Level 3 as permitting "competitive procurement, data for competitive reprocurement is different from data for a build to print contract." Similarly, Mr. Giangrosso testified that drawings adequate to support a "competitive procurement" are not necessarily adequate for a competitive build to print procurement. Earl Anderson, chief of the Air Force's reprocurement team responsible for buying the additional MUTES from Aydin, testified that "[h]aving a Level 3 package and doing an acquisition build to print absolutely does not mean the same thing."

14-15. Instead of rebutting testimony with citations to the record, Mr. Willis merely labels testimony that he disagrees with as "inadmissible," "questionable," and "orchestrated," thereby requesting the Court to review the credibility and admissibility of their testimony. Petition, p. 14.

Further, the evidence established that the completeness and accuracy required for a Level 3 drawing is tailored through negotiation and drawing review to fit the needs of a particular procurement. Petition Appendix B-4. The district court summarized that process, describing how General Dynamics and the Air Force worked together on the project:

> Both prior to and after the award of the . . . Contract, General Dynamics and the Air Force met regularly and frequently, attempting to reach agreement as to the scope and specific kind of information that was required to be placed on the General Dynamics Level 3 drawings.
>
> * * *
>
> The Air Force regularly monitored and inspected all aspects of General Dynamics' performance . . . including . . . the preparation of the Level 3 drawings.
>
> * * *
>
> The intent of the Air Force's in-process drawing reviews was to drive major errors from the drawings. What is considered a major error depends on how the drawings are going to be used. In the case of the MUTES drawings, major errors are those errors which would prohibit a competent contractor from reprocuring spares.
>
> * * *

> [T]he Air Force conducted a series of Physical Configuration Audits in which General Dynamics participated. The Physical Configuration Audits constituted the formal examination and comparison of the MUTES hardware with the Level 3 engineering drawings.
>
> * * *
>
> During the final Physical Configuration Audit, the Air Force audit team discovered discrepancies between General Dynamics' drawings and the hardware. The Air Force considered some of these discrepancies to be minor in nature, and other discrepancies were noted and disclosed to General Dynamics on individual discrepancy sheets.
>
> * * *
>
> [D]espite the presence of some errors in the drawings sampled by the Air Force, the Air Force determined that all of the drawings, whether or not specifically reviewed during the audit, satisfied General Dynamics' obligation under the . . . contract.

Petition Appendix B-4 to B-7.

Neither Mr. Willis' appellate brief nor his petition attempts to refute the court's recitation of those events which show that General Dynamics could not possibly have cheated the government under those circumstances. The level of government scrutiny of a contractor's performance has been considered as a factor in negating claims of fraudulent conduct by the contractor. In *United States ex rel. Butler v. Hughes Helicopter Company*, 71 F.3d 321 (9th Cir. 1995), another *qui tam* action, the court found:

> [T]he overwhelming evidence established a pattern of cooperation between the Army and [the defendant] during the course of a complicated, sophisticated, and highly technical military procurement program. . . . The evidence established that all information upon which [plaintiff] bases his case was not only available to the Army, but in the Army's possession.

Id. at 326 (quoting the district court's opinion). In *Wang, ex. rel. United States v. FMC Corp.*, *supra*, 975 F.2d at 1421, the court noted the government's own knowledge of defendant's engineering shortcomings, which supported the finding that defendant had performed in a manner consistent with the government's expectations.

> The government knew of FMC's mistakes and limitations, and that FMC was open with the government about them, suggests that while FMC might have been groping for solutions, it was not cheating the government in the effort. Without more, the common failings of engineers and other scientists are not culpable under the Act.

In the instant action, the district court held that "General Dynamics' drawings met the Level 3 requirements . . . [and] [t]he Air Force accepted General Dynamics' [technical data package] with full knowledge of the condition of the data contained therein . . . ." Petition Appendix B-9. While the condition of the drawings was not perfect -- as Mr. Willis insists it was required to be --

> [u]nder the contract interpretation shared by defendant and the Air Force, there was no expectation that General Dynamics' drawings would be error-free. The Air Force and General Dynamics recognized this

> impossibility and applied practical solutions aimed at driving out major or significant errors from the drawings.

Petition Appendix B-23. This finding was supported by the testimony of Col. Devenny:

> I have never bought [a Level 3 drawing package] that was without errors. These packages contain literally millions of opportunities for error and current contractor data systems cannot produce an error-free data package. . . .[I]t would be unreasonable for anyone to expect an error-free package on a complex product such as the MUTES.

In fact, of the claimed errors which Mr. Willis personally selected to demonstrate the kinds of errors that were made, about half were not in need of correction by Aydin (and therefore not subject to Mr. Willis' claimed damages); the other half, as the court found, "could fairly be characterized as minor clerical or typographical errors." Still others, Mr. Willis eventually admitted, were not caused by General Dynamics. Petition Appendix B-10. In short, they did not suggest fraud. Nor did those claimed errors or anything else suggest that General Dynamics was in any way responsible for the Air Force's decision to pay additional sums to Aydin to convert Aydin's contract to a performance specification contract.11/

11/ Regarding that decision by the Air Force, the court found that the Air Force originally had intended for Aydin to receive a performance specification contract and use General Dynamics' technical data package only as a guide. All of the testifying officials involved in the award of Aydin's contract and Aydin's performance (except for the contracting officer) testified that the

(Footnote cont'd on next page)

In contrast, the evidence showed that the Air Force received from General Dynamics precisely what it sought, and that the technical data package was of a very high quality which the Air Force has used successfully. As Joseph Giangrosso, Air Force Program Manager for the MUTES program, testified, "the Air Force was satisfied that the drawings were meeting the Level 3 standards" and "[b]ased on my experience with various drawing packages, I believe that GD's drawing package was as good as any other Level 3 drawing packages that I have worked with in the past."

In sum, despite Mr. Willis' personal and unsupported assumptions about what General Dynamics was required to provide -- an error free package suitable for building entire MUTES systems on a build-to-print basis -- General Dynamics provided that which the Air Force required. Thus, even if Mr. Willis could state a cause of action under the False Claims Act stemming from deficient contract performance, there is no support in the record for any such finding.

(Footnote cont'd from previous page.)

contracting officer made a mistake in awarding the Aydin contract as a build-to-print contract. Thus, the additional sums paid to Aydin were the result of the Air Force's mistake and had nothing to do with General Dynamics. Petition Appendix B-15, B-19.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, ex rel.
MURRAY W. LINDENTHAL; DONALD B. WILLIS
Petitioner,

vs.

GENERAL DYNAMICS CORPORATION,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

REPLY TO BRIEF IN OPPOSITION

Donald B. Willis, *pro se*
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9 pp

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I. REPLY SUMMARY

The Opposition Brief does not directly address the Questions Presented in the Petition and, in fact, provides no opposition to most of the questions contained in the Petition. The Opposition Brief, instead, presents two other questions and bases its arguments on those. Those Respondent questions differ in scope from the Petition questions as will be discussed in the next section.

A primary element of the Opposition Brief appears to be a question of the credibility of the Petitioner. In fact, Mr. Willis is personally addressed, in less than glowing terms, on some 60 occasions in the 22 pages of the brief. This petitioner sincerely believes that this court will grant or deny the Petition based on its merits without concern for who the author was.

This brief continuously states that this FCA action was and is based strictly on Mr. Willis' personal legal theories and contract interpretations without support of authorities or the record. With all due respect to respondent's counsel, the petitioner believes that is a decision to be made by this court without direction from respondent's counsel.

As background, the petitioner is an unemployed 63 year old party in involuntary early retirement. Under the current conditions of this action, he has a duty as the only available agent of his fellow taxpaying citizens to pursue this fight against fraud. He cannot morally abandon them due to costs of this action which he can ill afford. He is a concerned citizen.

The Opposition Brief is also replete with less than accurate statements. In the interests of brevity, only a few of these will be noted. The Petitioner believes that, should this court grant the petition, the petitioner will be held accountable for his truthful representation of the facts in the courts below. It is hoped that will also be true for the respondent.

This reply addresses each section of the Opposition Brief as paraphrased in the Table of Contents.

II. OPPOSITION BRIEF - QUESTIONS PRESENTED

Question 1. is too narrow in scope. Under Respondent's contention that Fees, Costs and Expenses are three separate and distinct categories under the FCA, a yes answer to this question would preclude an award of costs to a prevailing defendant in a clearly frivolous action. That would be unfair to an injured defendant.

However, under the Petition questions, section 3730(d)(4) of the FCA stands on its own merits without regard to F.R.C.P. 54(d). In that case where costs are a subset of expenses, i.e. expenses include expenses taxable as costs and expenses not taxable as costs, then a prevailing defendant may be awarded his taxable costs in a clearly frivolous action and would not be awarded taxable costs in a good faith action. Those results are reasonable and in concert with the intent of Congress.

Question 2. goes far beyond any question presented in the Petition. This question asks the Supreme Court to determine the innocence or guilt of the defendant which is not appropriate. The questions in the Petition only ask this court to determine if portions of the evidentiary base used by the lower courts were in fact contrary to the law. If this court should concur, then the case would be returned to the lower courts to determine the innocence or guilt of the defendant with the revised evidentiary base.

For example, during the GD MUTES and GD Aperture Card contracts, both the AF and GD had full knowledge and understanding that the Level 3 Drawings produced thereunder were being used and were deemed adequate for the follow-on build-to-print contract for entire MUTES systems. Neither the AF nor GD took contemporaneous exception to that understanding and knowledge by questioning or objecting to the actual use of the drawings on the follow-on contract. Under Federal law, they were

bound to that interpretation on those contracts. Should this court concur, the lower courts would re-evaluate all evidence and establish the defendant's innocence or guilt based on the proper interpretation that the drawings were to be adequate for the intended usage.

It is noted that respondent takes no exception to this GD and AF common understanding and knowledge that the Level 3 Drawings were adequate for usage on the follow-on contract for complete MUTES systems. Respondent only contends that the AF did not intend to do what it did, i.e. award that contract for build-to-print MUTES systems.

III. OPPOSITION BRIEF - PARTIES TO THE PROCEEDING

Murray W. Lindenthal is a party to this proceeding under Supreme Court Rule 12.6 and would be the authorized representative of the Petitioner under Rule 35.1.

IV. OPPOSITION BRIEF - STATUTORY PROVISIONS

The standard of liability under the FCA is not questioned by the Petitioner.

V. OPPOSITION BRIEF - STATEMENT OF THE CASE

1. Misstatement of Fact - On page 3, last para., that "Mr. Willis was employed as an engineer" at Aydin. Mr. Willis was Vice-President of Program Management and Program Manager of the Aydin MUTES program.

2. Misstatement of Fact - On page 4, last para., that Mr. Willis was not "involved in any way" in the GD MUTES contracts. As an official of Aydin, Mr. Willis was involved in verifying to the Air Force that the GD Level 3 Drawings were not legible which resulted in the AF award of the Aperture Card contract to GD for a current and legible set of microfilm of the Level 3 Drawings which GD knew were for the Aydin build-to-print contract.

3. Misstatement of Fact - On page 4, last para., that drawings were used "as a guide to assist Aydin in building entire MUTES systems." Aydin was still required to correct the drawings, obtain AF approval of the corrections and then "build-to-print" to those drawings. Aydin could not deliver MUTES systems which did not comply with the corrected Level 3 drawings. The drawings were not used as a guide.

4. Conflicting Evidence - On page 5, last para., that the Level 3 drawings had "a small number of minor errors." In the Petition at Appendix F-2, the acting Staff Judge Advocate at McClellan AFB noted that "Errors in the data attributable to GD account for at least 960 engineering change orders by the successor contractor, Aydin, at a cost of over $21M." Prior to the end of the Aydin contract, the 960 number rose to over 1,500.

5. Witness Credibility - On page 5, last para., (also Footnote 11/) of the "AF's own acknowledgment" that it originally intended the Aydin contract to be a performance specification contract, not a build-to-print contract. This statement assumes that the formal United States Air Force position is derived from the testimony of AF engineers and is not based on what the AF actually did nor on what the AF contracting officials put in writing or testified to, i.e. assumes that the AF engineers knew more about contractual intent than the contracting officials.

VI. OPPOSITION BRIEF - REASONS FOR DENYING THE PETITION

1. One or a Thousand - On page 8, last para., that the petitioner "does not cite any such decision" supporting his contention that no prior district courts have awarded costs to prevailing defendants in non-frivolous FCA actions. Since the 1986 amendments to the FCA there have been some 1,000 FCA actions gone to judgment. The petitioner, perhaps foolishly, felt it was ridiculous to cite

these 1,000 cases to the courts for them to review the complete judgments to verify that no costs were awarded. In lieu thereof, the petitioner in plaintiffs' appellate reply brief on page 1, lines 8-15 made this statement.

> "In plaintiffs' opening brief in appeal #94-16005, page 2, lines 10-17, plaintiffs noted that neither the district court nor the defendant had identified a single authority where a court had awarded costs to a prevailing defendant in a non-frivolous Federal False Claims Action (FCA) in which the Government had not intervened. Plaintiffs therefor challenged the defendant to expose any such authorities. In this Answer Brief, defendant still identifies no authorities which have awarded such costs or even discussed the possibility of awarding such costs."

Prior to making those statements, the petitioner reviewed case histories and consulted with John R. Phillips, co-author of the 1986 amendments, and Alan Schusterman of Taxpayers Against Fraud, both of Washington, D.C. Neither knew of any cost awards.

Respondent in this Opposition Brief still has not cited a single FCA awarding costs in this situation.

2. Respondent Agreement with Petitioner - On page 10, respondent quotes the district court from *Hairline,* "Expenses not properly taxed as 'costs' are considered 'expenses'." and from *Dickerson,* "Therefore, a court may deny certain expenses while granting others as costs." In pure simple English, those statements define "costs" as a subset of "expenses," as petitioner contends.

3. False Statement - Page 15 to 16, that Mr. Willis references to Col. Schuster and the "Interpretation Agreement" are not supported "because the record does not reflect Mr. Willis' assertions." Col. Schuster's testimony and the Interpretation Agreement are thoroughly discussed in plaintiffs' appellate reply brief (#93-16690) on page 8 under heading "G. Col. Schuster

Contradicts GD Allegations." Col. Schuster's testimony is Plaintiffs' Supplemental Excerpt of Record (PSER) #11 and the Interpretation Agreement is PSER #1.

4. Misstatement of Fact - Page 14, last para., that "according to Mr. Willis, since the data package was not put to that use," i.e. build-to-print. The petitioner has never and will never contend that the AF did not use the data on a build-to-print contract. The AF, under standard procurement practices, used the data in the build-to-print Aydin contract.

5. Witness Credibility - On page 16, last para., that "the AF witnesses testified that" the drawings were "not for buying entire MUTES systems on a build-to-print basis." See item V.5. supra.

6. Misstatement of Fact - On page 16, footnote 10/, that Earl Anderson was "Chief of the AF's reprocurement team." This exact quote was refuted in plaintiffs' appellate reply brief (#93-16690) on page 16, line 17 to page 17, line 4 which points out in the record where Mr. Anderson testified he was just an engineer during the reprocurement period.

7. Unqualified Expert Testimony - Footnotes 9/ and 10/ contain testimony of Devenney, Giangrosso and Arnold relative to MIL-D-1000A Level 3 specification. Plaintiffs' appellate reply brief (#93-16690) on page 10, section "I. GD Level 3 Data Requirements Testimony" specifically identifies in the record where Devenney testified he had never read MIL-D-1000A and Giangrosso and Arnold could not identify the specification as MIL-D-1000A in their testimony.

8. Misstatement of Fact - Page 20, last para., that "anything else suggest that GD was in any way responsible for the AF's decision to pay additional sums to Aydin." In the Petition at Appendix F-2, the acting Staff Judge Advocate at McClellan AFB noted that "Errors in the data attributable to GD account for at least 960

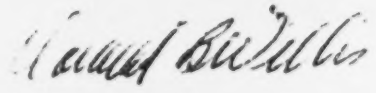
engineering change orders by the successor contractor, Aydin, at a cost of over $21M."

VII. CONCLUSION

The Opposition Brief contains no new or material points which should deter the granting of a writ of certiorari.

Dated: March 1, 1996

Respectfully Submitted,



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